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No. 06-

IN THE
SUPREME COURT OF THE UNITED STATES

BERNARD PENZIEN and KAREN PENZIEN,

Petitioners,

v.

VILLAGE OF CAPAC, a Michigan Municipal Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment is violated when a municipality demolishes a building without first attempting to provide notice to the owners?

2. Whether a state statute/municipal ordinance which authorizes a municipality to demolish a building without providing notice to the owners violates the Due Process Cause of the Fourteenth Amendment?

3. Whether a state statute/municipal ordinance which authorizes the placement of a demolition lien on the property tax rolls without first providing notice to the owner of the demolition violates the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties are set forth in the caption of the case.[1]

[1] The Michigan Department of Treasury was originally named as a party-Defendant to terminate several state tax liens that had been filed against the real estate. The State tax liens were removed on August 18, 2004, pursuant to Court Order. The State has not appealed that action and is not involved in the matter now before this Court.

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BERNARD PENZIEN and KAREN PENZIEN,

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v.

VILLAGE OF CAPAC, a Michigan Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioners, Bernard Penzien and Karen Penzien (Petitioners) respectfully pray that a *Writ of Certiorari* issue to review the Opinion and Judgment of the Michigan Court of Appeals which was entered in this civil action on June 29, 2006, and which thereafter, on February 27, 2007, the Michigan Supreme Court denied Petitioners' timely Application for Leave to Appeal.

OPINIONS BELOW

The Michigan Court of Appeals issued its unpublished Opinion on June 29, 2006. The opinion is available at 2006 WL 1791630 and is reproduced in the appendix to the Petition for a Writ of Certiorari (Pet. App.

3a). The Michigan Supreme Court's Order Denying Petitioners' Application for Leave to Appeal on February 27, 2007, is reported at 477 Mich 1031 (2007), and is reproduced at Pet. App. 1a. The trial court's Order (with Opinion) Granting Respondent's Motion for Summary Disposition as to Counts II through V, dated June 14, 2004 is reproduced at Pet. App. 14a. The trial court's Order (with Opinion) Granting Petitioners' Motion for Summary Disposition as to Count I, and Quieting Title to Real Estate dated November 15, 2004, is reproduced at Pet. App. 24a.[2]

JURISDICTION

The Michigan Court of Appeals issued its Opinion on June 29, 2006. A timely Application for Leave to Appeal was filed with the Michigan Supreme Court on August 9, 2006 and denied on February 27, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES/ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. Amend, XIV, § 1.

The State Housing Code, MCLA 125.540, provides in relevant part:

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[2] While the trial court did grant Count I of Petitioners' state court Complaint to Quiet Title, and remove Respondent's demolition lien, the Michigan Court of Appeals, pursuant to Respondent's appeal, reversed the trial court, as such, the Dangerous Building Assessment Lien, Appendix H, remains against Petitioners' title.

"Sec. 140 (1) Notwithstanding any other provision of this act, if a building or structure is found to be a dangerous building, the enforcing agency shall issue a notice that the building or structure is a dangerous building.

"(2) The notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency under section 125. If an owner, agent, or lessee is not registered under section 125, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records.[3]

* * *

"(5) The notice shall be in writing and shall be served upon the person to whom the notice is directed either personally or by certified mail, return receipt requested, addressed to the owner or party in interest at the address shown on the tax records."

MCLA 125.541 provides in relevant part:

(2) If the hearing officer determines that the building or structure should be demolished, otherwise made safe, or properly maintained, the hearing officer shall so order, fixing a time in the order for the owner, agent, or lessee to comply

[3] This matter was decided on Respondent's first responsive pleadings without discovery. There is no evidence that this building was registered with the local government. Petitioners do not believe it was.

with the order. If the building is a dangerous building under section 139(j) . . . .

* * *

(4) The legislative body or the board of appeals of the city, village, or township, as applicable, shall fix a date not less than 30 days after the hearing prescribed in section 140 for a hearing on the findings and order of the hearing officer and shall give notice to the owner, agent, or lessee in the manner prescribed in section 140 of the time and place of the hearing. . . . If the legislative body or board of appeals approves or modifies the order, the legislative body shall take all necessary action to enforce the order. If the order is approved or modified, the owner, agent, or lessee shall comply with the order within 60 days after the date of the hearing under this subsection.

* * *

(6) The owner or party in interest in whose name the property appears upon the last local tax assessment records shall be notified by the assessor of the amount of the cost of the demolition, of making the building safe, or of maintaining the exterior of the building or structure or grounds adjoining the building or structure by first class mail at the address shown on the records. If the owner or party in interest fails to pay the cost within 30 days after mailing by the assessor of the notice of the amount of the cost, the city, village, or township shall have a lien for the cost incurred by the city, village, or township to bring the property into conformance with this act. The lien shall not take effect until notice of the lien has been filed or recorded as provided by law. A lien provided for in this subsection does not have priority over previously filed or recorded liens and encumbrances. The lien for the cost shall be collected and treated in the same manner as provided for property tax liens under the general property tax act, Act No. 206 of the Public Acts of 1893, being sections 211.1 and 211.157 of the Michigan Compiled Laws.

The Capac Village Ordinance regarding building enforcement/demolition provides in relevant part:

> Sec. 6-68. Notice.
>
> When the whole or any part of any building or structure is found to be in a dangerous condition, the building inspector shall issue a notice which shall specify the nature of the dangerous condition and the repair or demolition necessary to make the building or structure safe.
>
> (1) The notice shall be directed to the person in whose name the property appears on the most recent village tax assessment records.
>
> (2) The notice shall specify the time and place of a hearing before the village council at which the person to whom the notice was directed shall have the opportunity to contest the findings of the building inspector.
>
> (Ord. No. 90-3, §3, 7-16-1990)
>
> * * *
>
> (b) If it is determined by the village council that the building or structure should be repaired, demolished or otherwise made safe, it shall so order, fixing a time within which compliance must be completed.
>
> (c) A copy of the decision of the village council shall be sent by regular mail or otherwise delivered to the person to whom the original notice was sent.

(Ord. No. 90-3, §5, 7-16-1990)

* * *

Sec. 6-72 Failure to comply; lien.

If the responsible persons do not comply with the village council's decision within the time specified, the village may arrange to have the required repair, demolition or other work completed. The cost of such required repair, demolition or other work shall be a lien against the real property on which the building or structure is located and shall be assessed against such real property on the next tax roll.

(Ord. No. 90-3, §7, 7-16-1990)

Sec. 6-73. Appeal to circuit court.

A person affected by a village council decision requirement the repair, demolition or other work on a building or structure, in which such person has an interest, may appeal the decision to the circuit court by filing an action within 20 days from the date of the decision by the village council.

(Ord. No. 90-3, §8, 7-16-1990)

STATEMENT OF THE CASE

A. Nature of the Action.

The underlying event that gives rise to this action was Respondent Capac's October 23, 2003 demolition of

Petitioners' building located in Capac, Michigan and the subsequent assessment of a Dangerous Building Assessment Lien in the amount of $51,239.00 against the real estate. (Appendix H, Pet. App. 40a) On March 1, 2004, Petitioners filed a 5-count Complaint to: 1) Quiet Title; 2) damages pursuant to 42 USC 1983 and the Fifth/Fourteenth Amendments to the U.S. Constitution; 3) inverse condemnation [as to Plaintiffs' real estate]; 4) damages for violation of Plaintiffs' substantive due process rights; and 5) trespass-taking [as to Plaintiffs' real estate].

B. Facts[4]

The real estate which is the subject matter of this litigation is commonly known as 101-105 S. Main Street, Capac, Michigan, and is owned by Petitioners, husband and wife. In 1997, Petitioners entered into a land contract for the sale of the real estate and on November 11, 1998, the original land contract purchasers assigned their interest to Holmes Enterprises, Inc., a Michigan corporation.[5]

In November 1999, the building located upon the property was damaged by fire. Following the fire, Holmes proposed various methods of repairing, remodeling and refurbishing the property to Respondent Capac. After Holmes and Respondent could not resolve matters,

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[4] The facts as set forth herein were established in the state court proceedings by various affidavits and exhibits which were filed by both Petitioners and Respondent. This matter was decided by the trial court without discovery and as a result of Respondent seeking dismissal in its first responsive pleading.

[5] At the time of the execution of the original land contract, fee title to the property was held by the Bernard Penzien Trust; the Trust assigned its interest to Petitioners on April 11, 1997 through a recorded Quit Claim Deed. Petitioners thereafter proceeded to forfeit the land contract pursuant to Michigan law, [MCLA 600.5701 and on June 26, 2003, any and all rights of Holmes terminated.

Respondent Capac, pursuant to its local ordinance, (Appendix E, Pet. App. 31a) did then conduct a dangerous building hearing on or about March 18, 2002, as to whether the building should be ordered torn down.[6] It is uncontroverted that Petitioners, the fee title owners of the subject property, were never provided with notice regarding the March 18, 2002 hearing.[7]

At the March 18, 2002 hearing, it was determined by Respondent Capac that the building shall be repaired, demolished or otherwise made safe (Appendix G, Pet. App. 37a). The council further found:

> "3. The owner shall repair, demolish or make safe said or [sic] building within twenty (20) days from the date of this determination.
>
> "4. If the owner or other interested party fails to repair, demolish or otherwise make safe said building within the twenty (20) day time period, upon the recommendation of the Capac Building Inspector, the Village shall demolish said building with the cost of such demolition work to be made a lien against the real property on which the building is located and assessed against the real property on the next tax roll." (Pet. App. 38a.)

Following the determination by Respondent Capac, on April 4, 2002, Holmes Enterprises did file an action in the

---

[6] Petitioners do not have evidence of any notice which may have been provided regarding the May 18, 2002 Village meeting. Petitioners do not challenge whether it was published and/or posted on the property. Petitioners were not provided notice of the hearing.

[7] See Appendix I and J, Pet. App. 52a-53a; the separate Affidavits of Petitioners; the Opinion of the Michigan Court of Appeals (Appendix B, Pet. App. 9a-10a); and the transcript of the May 10, 2004 Motion hearing (Appendix L).

St. Clair County Circuit Court, (#D-02-0934-CZ, *Holmes* v. *Capac*) challenging Respondent Capac's decision. On September 19, 2002, a Judgment was entered in favor of Respondent Capac (Appendix M, Pet. App. 54a). Nowhere in the Judgment or Complaint are Petitioners Penzien or the "owner's" rights mentioned. Capac recorded the Judgment against the real estate. Petitioners were never made parties to the above-described St. Clair County action and were never notified of any of the hearing dates before the Court.

On or about October 23, 2002, without having provided any notice to Petitioners, Respondent Capac, through its contractors, did commence to tear down the building. Upon receiving word that the building was being torn down (Appendix I, Pet. App. 42a-45a), Petitioners did prepare on October 24, 2002, an Emergency Motion to Intervene in the Holmes Enterprises action (Appendix N); however, those pleadings were not filed with the St. Clair County clerk as the building was already down on October 24, 2002.[8]

Following the demolition, Respondent Capac, on February 19, 2003, did record a Dangerous Building Assessment Lien against the subject property in the amount of $51,239.00 (Appendix H) with the St. Clair County Register of Deeds, which is now included in Petitioners' tax bill on the property.

C. Trial Court Proceedings.

Following the filing of the state court damage suit, Respondent moved for Summary Disposition in its first responsive pleading. MCLA 2.116(C)(10). At the motion hearing, the following arguments/comments were made:

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[8] See Appendix I, Affidavit of Petitioner Bernard Penzien.

[Mr. Tamm: Attorney for Respondent Capac]

> "Mr. Penzien claims that he didn't have notice, and in particular that notice wasn't served upon him. But the Village isn't obligated to serve him with notice under the statute. We're obligated to serve the taxpayer of record, and Mr. Penzien, if the court would look to the Land Contract, required that Holmes Enterprises be the taxpayer of record.
>
> * * *
>
> "To suggest that this--he didn't know about this when it was on the front page of the newspaper and his Land Contract vendee certainly had notice and was determined to have notice, and in addition to that, your Honor, Mr. Heyboer filed a--a petition to intervene before the demolition took place. So all of these demonstrate that there was notice." (Appendix L, Pet. App. 52a-53a.)

The trial court did grant Respondent's Motion and dismissing Counts II-V, specifically finding in its written Opinion, (Appendix C, Pet App. 22a) that as notice was provided to the land contract vendee, Holmes, and as Petitioners were aware that the building had been damaged, Petitioners' due process rights were not violated. The trial court, at a subsequent hearing did grant Petitioners Summary Disposition (MCR 2.116(C)(10)) on Petitioners' request to remove the demolition lien from the tax.[9] In doing so, the

[9] The trial court's determination removing the Dangerous Building Assessment Lien was based upon procedural and priority issues under various Michigan statutes.

trial court did not address Petitioners' specific argument that MCLA 125.540 was unconstitutional.

D. Michigan Court of Appeals

As a result of the rulings by the trial court, both Petitioner and Respondent filed appeals with the Michigan Court of Appeals. The Court of Appeals affirmed the trial court's dismissal of Petitioners' damage claim, finding that Respondent's notice to Holmes, and Respondent's compliance with MCLA 125.540 and the Village Ordinance was constitutionally sufficient to protect Petitioners' due process rights. The Court of Appeals further did reverse the trial court's removal of the demolition lien. The Court of Appeals rejected Petitioners' argument that MCLA 125.540 constituted an unconstitutional due process violation.

E. Michigan Supreme Court

The Michigan Supreme Court denied Petitioners' Application for Leave to Appeal; this Petition for Issuance of a Writ of Certiorari now follows.

REASONS FOR GRANTING THE WRIT

THE OPINION OF THE MICHIGAN COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW.

At no time whatsoever did Respondent ever attempt to provide notice to Petitioners when it conducted its March 18, 2002 Dangerous Building hearing/determination and demolished Petitioners building which resulted in a Dangerous Building Assessment Lien of $51,239.00. Respondent claims that Petitioners, the owners of the

building, were not entitled to notice and thus its actions are constitutional.

The Due Process Clause of the Fourteenth Amendment forbids a State to deprive an individual of life, liberty or property without "due process of law." U.S. Const. Amend. XIV, § 1. Due process includes the right of notice and the opportunity to be heard as a pre-condition to any proceeding/action that will adversely affect the property interest of any party and/or deprives an individual of their property. *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 800 (1983).

A. Due Process Was Not Satisfied When Petitioners' Building was Demolished Without Notice

At all times relevant to this proceeding, Petitioners had a legally protected interest in property which afforded them protection under the Due Process Clause of the Fourteenth Amendment. While Petitioners' interest in the real estate was subject to a land contract, legal title was retained by Petitioners. *Curry* v. *Curry*, 213 Mich 309 (1921); *General Electric* v. *Levine*, 50 Mich App 733 (1973). In *Dow* v. *Michigan*, 396 Mich 192 (1976), the Michigan Supreme Court held that a husband and wife's ownership of real estate is an estate by the entirety and each spouse must be provided separate notice to comply with the Due Process Clause. (396 Mich 192, footnote 10.) Clearly, Petitioners have a legally protected property interest which entitles each to notice reasonably calculated to apprise them of the dangerous building proceedings and demolition activity as a pre-condition to any action by Respondent. *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 798 (1983).[10] As

[10] As fee title holders, the fact that Petitioners have a legally protected right under the Due Process Clause should be beyond question. See

Petitioners have a legally protected property right, they are therefore entitled to those rights as determined in *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306 (1950).

In *Mullane*, this Court held that prior to an action that will affect property affected by the Due Process Clause, government must provide:

> "Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. @ 314.

Having determined the right to notice, the issue now becomes the type and sufficiency of the notice to be provided.

It appears that notice may have been provided by Respondent to Holmes Enterprises prior to the March 18, 2002 Dangerous Building hearing by publication and/or posting. Petitioners cannot challenge the claim and they do not dispute the assertion. Regardless, this form of "notice" does not comply with the Due Process Clause. The record, however, is clear that at no time did Respondent ever even attempt to provide written notice to Petitioners.

This Court has consistently rejected as inadequate, notice by publication and/or posting where the name and address of the party to be adversely affected is reasonably ascertainable. See *New York* v. *N.Y., N.H. & H.R. Co.*, 334

Mennonite, a mortgagee had a protected property interest in real estate subject to a tax sale; *Tulsa Professional Collection Services* v. *Pope*, 485 U.S. 478 (1988), an intangible cause of action, a debt, afforded a collection agency a protected property interest, *Memphis Light, Gas & Water Div.* v. *Craft* 436 U.S. 1 (1978), right to preclude utility shut-off afforded the resident a protected property interest.

U.S. 293 (1953), (a known creditor in a bankruptcy proceeding had a due process right to be given actual notice of claim dates); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956), (where notice by publication only in a condemnation action was inadequate, where the landowner's name was known to the city and was in an official record); *Schroeder* v. *New York City*, 371 U.S. 208 (1962), (a newspaper publication and posted notices ere inadequate to inform the property owner of condemnation proceedings when the name and address was readily ascertainable from deed records and tax rolls); *Greene* v. *Lindsey*, 456 U.S. 444 (1982), (the posting of a summons on a tenant's door at a public housing project was inadequate notice of providing notice of an eviction). Respondent has never claimed that Petitioners' names and addresses were unknown.[11] On the contrary, Respondent simply claimed Petitioners were not entitled to notice.

Petitioners' ownership interest in the property has at all times been a matter of public record. In *Mennonite*, this Court stated:

> "When a mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably

[11] It is important to note that prior to 2002, Petitioners were the designated taxpayer according to Respondent's tax records. (See Appendix K, Pet App 48a). In 2002, as a result of Holmes' recording of the land contract assignment, Respondent then changed its tax rolls. On its face, MCLA 125.541 (as well as the Village ordinance) require only notice of the dangerous building/demolition proceedings to the taxpayer of record. Ironically, it was Respondent who changed the tax rolls removing Petitioners name, based upon vendee Holmes Enterprises' recording of its assignment of land contract with the St. Clair County Register of Deeds. Prior to that time, the tax bill came to Petitioners.

> identifiable, constructive notice alone does not satisfy that mandate of *Mullane*." 462 U.S. @ 798.

Further, as Respondent itself changed the tax roll notices, Respondent would be hard pressed to claim that Petitioners' interest was unknown.

In the case at bar, the only notice provided was to Holmes, posting and possibly by publication. This Court has repeatedly approved as reasonable, notice by mailing to an individual property owner's last known address. *Dusenbery*, 534 U.S. 161, 169 (2002); *Tulsa Professional*, 485 U.S. at 490; *Mennonite*, 462 U.S. at 795, 797-98; *Greene* v. *Lindsay*, 456 U.S. 444, 455 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 13-15 (1978); *Eisen* v. *Carlisle*, 417 U.S. 156, 174-75 (1974); *Bank of Marin* v. *England*, 385 US. 99, 102 (1966); *Schroeder*, 371 U.S. at 214; *Covey* v. *Town of Somers*, 351 U.S. 141, 146-47 (1956); *Walker*, 352 U.S. at 116; *New York City* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296-97 (1953). In *Mullane* itself, the Court held that "ordinary mail to the record addresses" of the affected property owners would be constitutionally sufficient. 339 U.S. at 318. In *Mennonite Board*, 462 U.S. at 798, the Court held that, unless a party is "not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*."

Respondent acknowledges that it did not give any notice to Petitioners. In fact, Respondent does not claim that Petitioners' identity and/or whereabouts were unknown. Rather, Respondent merely asserts that Petitioners were not entitled to notice as MCLA 125.540 and the Village Ordinance do not require notice, and the notice to the land contract vendee Holmes was sufficient and thus the Due Process Clause was satisfied. While notice by publication may be acceptable to persons whose whereabouts is

unknown, *Tulsa* 485 U.S. at 491; *Mennonite*, 462 U.S. at 797, it is not acceptable in the case at bar.

Respondent further asserts that as Petitioner Bernard Penzien learned on October 23, 2002 that the building was being demolished, and that Petitioners attempted to intervene in an action by Holmes on October 24, 2002, Appendix N, that Petitioners had sufficient notice to comply with Due Process. Of course, any knowledge on October 23, 2002 does not constitute notice for the March 18, 2002 hearing and, the October 23, 2002 notice was that the building was being demolished (see Appendix I). In *Mennonite*, this Court recognized the government's constitutional duty, stating: "[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation," 462 U.S. at 799.

In *Mennonite*, the Indiana tax sale statute did not require notice to a mortgage holder. This Court held that mortgagees are entitled to "notice reasonably calculated to apprise [them] of a pending tax sale" and that the statutory preclusion of mortgagees as parties to receive notice of tax sales did not relieve the State of its due process obligation to provide such notice.

> In fact, in *Mennonite*, this Court held:
> "Neither notice by publication and posting, nor mailed notice to the property owner, are means 'such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it.' *Mullane*, 339 U.S., at 315. Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to

keep abreast of such notices. *Walker* v. *City of Hutchinson, supra*, at 116; *New York* City v. *New York, N.H. & H.R. Co., supra*, at 296; Mullane, *supra*, at 315. Notice to the property owner, who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee. Cf. *Nelson* v. *New York City*, 352 U.S. 103, 107-109 (1956). The county's use of these less reliable forms of notice is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service is available.' *Greene* v. *Lindsey, supra*, at 455.

"Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discovery whether property taxes have not been paid and whether tax-sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involved a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.

* * *

"Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether

> unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter 'was the information which the [county] was constitutionally obliged . . . to give personally to the appellant - an obligation which the mailing of a single letter would have discharged.' *Schroeder* v. *New York City*, 371 U.S., at 214.

The Michigan Court of Appeals, in responding to this Court's ruling in *Jones* v. *Flowers*, 547 U.S. 220 (2006), stated that there was nothing to alert Respondent that it needed to provide any other notice, i.e., an unclaimed certified letter, and therefore, Respondent's notice was sufficient. The Michigan Court of Appeals' rationale is flawed for several reasons:

a. Petitioners could not alert Respondent of anything as they were not provided notice of and were unaware of the administrative hearings;

b. Respondent's duty is determined by the Due Process Clause, i.e., *Mennonite*;

c. Notice to a third party on behalf of Petitioners, i.e., Holmes, as being adequate was rejected in *Mennonite*;

d. Compliance with a statute does not equate to constitutional notice under the Due Process Clause. (See *Tulsa Professional* where, while the estate complied with the Oklahoma probate 2 month claims bar statute, as the statute was unconstitutional; *Mennonite*, no notice to mortgagees required; *Wisconsin* v.

Constantineau, no notice to a known drunkard.)

Further, in all cases where "notice" is provided by publication, one would assume that the government is not aware of a notice issue prior to the action taken against the property. The reason is the affected party has not been afforded notice reasonably calculated to apprise them of the action.

The failure of Respondent to be aware of its due process notice violation does not change Respondent's underlying obligation. One can assume that the mortgage holder in *Mennonite*; the creditors in *New York*; the collection agency in *Tulsa Professional*; the homeowners in *Walker* and *Schroeder*; the tenant in *Greene*; the homeowner in *James Daniel Good Real Property*, all failed to alert the government in advance of each action for one particular reason, they were not afforded notice. Certainly Petitioners' failure to alert Respondent of Respondent's failure to notify Petitioner of the March 18, 2002 Dangerous Building hearing does not eliminate Respondent's due process violation.

Ordinary mail is a constitutionally sufficient means of seeking to deliver notice to persons whose addresses are known. See, e.g., *Tulsa Prof'l Collection Servs.* v. *Pope*, 485 U.S. 478, 490 (1988) (probate creditor claims); *Mennonite Bd. Of Missions* v. *Adams*, 462 U.S. 791, 798 (1983) (tax sale of real property); *Walker* v. *City of Hutchison*, 352 U.S. 112, 116 (1956) (real property condemnation).[12]

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[12] If a claimant in a class action with a minimal claim is entitled to notice of the proceeding by mail, certainly so are Petitioners. See *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 (1985)

This Court has found that posting notice at a property may be unlikely to apprise the owner of an upcoming proceeding, because such notices may be removed by children, vandals, or others before they are able to convey their message to the property's owner. See *Greene* v. *Lindsay*, 456 U.S. 444, 453-454 (1982).

In the case at bar, Petitioners were entitled to notice, which, at a minimum would be by mail. *Mennonite*. As Respondent failed to even attempt any notice to Petitioners, Respondent failed to comply with Due Process.

B. The Placement of a Dangerous Building Assessment Lien Upon Petitioners' Property, Without Notice, Violates Due Process Clause of Fourteenth Amendment

Pursuant to MCLA 125.540 and the Village Ordinance and as part of the Holmes appeal process, Appendix M, following the demolition of Petitioners' building, a dangerous building lien in the amount of $51,239.00 was recorded against the real estate. (Appendix H, Pet. App. 40a.) In fact, the lien became an assessment against the land which is subject to collection pursuant to the Michigan General Tax Act, MCLA 211.40, which, if not paid by Petitioners, will result in the loss of the property at the annual tax sale. Not only have Petitioners lost their building, they now stand to lose the land at a subsequent tax sale. The lien imposed upon Petitioners' property was the result of Petitioners' never having been provided with any notice of the proceedings before Respondent Village and/or any Court/Tribunal and the demolition of the building.

Respondent had two (2) avenues by which to proceed to rectify any dangerous building issues in this matter:

A. A Judicial action under MCLA 125.534, or

B. An administrative proceeding under MCLA 125.541.

Had Respondent acted pursuant to MCLA 125.534, Petitioners, the fee title holders, would be named parties, would be served with process, would be involved in the proceeding, and would be bound by any Judgment. Simply stated, Petitioners would be afforded Due Process protection, (See MCLA 125.534, Appendix F, Pet. App. 33a).

Through the administrative system (MCLA 125.540/ Capac Ordinance), since Respondent had changed the tax records to reflect the interest of Holmes, Petitioners were not provided notice of any proceedings. Having declared the building dangerous and ordering its demolition, not only did Respondent demolish the building without affording Petitioners with notice, a demolition lien was placed upon the property and Petitioners now face the loss of the property.

Due Process requires that a property owner be afforded notice and an opportunity for a hearing prior to a pre-judgment seizure of property. *Sniadach* v. *Family Finance Corp of Bay View*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *North Georgia Finishing, Inc.* v. *DiChem, Inc.*, 419 U.S. 601 (1975); *Connecticut* v. *Doehr*, 501 U.S. 1 (1991). While Respondent was involved in a judicial proceeding with Holmes which resulted in a judgment authorizing the demolition and tax lien, (Appendix M), Petitioners were not parties to the action.

State procedures for creating and enforcing liens against property are subject to Due Process protection afforded by the Fourteenth Amendment. *Peralta* v. *Heights Medical Center, Inc.*, 485 U.S. 80 (1988). More importantly, regardless of statutory provisions, the statute must still

comply with the Due Process Clause of the Fourteenth Amendment.

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court stated:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Surely, if due process is violated where one has a default judgment entered against them without proper service of process, which judgment is thereafter recorded against real estate and the real estate is sold to satisfy the judgment; *Peralta*, or a state probate statute provides a two-month claims bar without requiring actual notice to a known creditor, *Tulsa Professional*; then to record a demolition lien against Petitioners' real estate without notice of the initial dangerous building determination and any of the subsequent proceedings equally violates due process.

As noted in *Peralta*:

> "Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of

> law would have led to the same result because he had no adequate defense upon the merits.' . . . As we observed in *Armstrong* v. *Manzo*, 380 U.S., at 552, only 'wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.' The Due Process Clause demands no less in this case."

Any statute that allows the placement of a lien upon property without first providing notice and opportunity for hearing to challenge the underlying issue is constitutionally infirm. *Mullane*, *Doehr*, *Peralta*. Respondent's compliance with a statute that does not comport with due process is not a defense. *Tulsa Professional*, *Wisconsin* v. *Constantineau*.

Your Petitioner submits that the statutory framework pursuant to MCLA 125.540 and the Village Ordinance, which allows the destruction of a structure, and thereafter, the assessment of a demolition lien, without mandating notice to the owner is unconstitutional on its face. Any statutory framework for hearings and the potential determination of the destruction/removal of a building and the assessment of the demolition costs, without the requirement of notice and opportunity to the title holder fails to meet constitutional muster.

Further, the fact that Respondent obtained a Judgment against Holmes, which authorized the lien is not binding on Petitioners. *Peralta*.

For the foregoing reasons, as the Dangerous Building Assessment Lien was obtained without notice to Petitioners, and in violation of Petitioners Due Process rights it is void and must be stricken from the record.

C. MCLA 125.540 and Capac Village Ordinance Are Unconstitutional as Applied to Petitioners

Petitioners acknowledge that Respondent did provide notice to the taxpayer of record [Holmes] pursuant to the terms and provisions of MCLA 125.540 and the Village Ordinance. In fact, both the trial court and the Michigan Court of Appeals likewise upheld Respondent's actions as Respondents complied with the State statute and the Village Ordinance. Notwithstanding Respondent's compliance, a statute/ordinance that does not require notice to the owner, (one with a legally protected interest) clearly violates the Due Process Clause of the Fourteenth Amendment, and as such, Respondent's actions are unconstitutional. *Wisconsin* v. *Constantineau.*

The provisions of MCLA 125.540 and the Village Ordinance are clear and unambiguous. The Appellate Courts of Michigan have not addressed the constitutionality of MCLA 125.540.[13] While this Court may abstain from addressing the constitutionality of a statute until the Appellate Courts of the State have addressed the issue, *Zwickler* v. *Koota*, 389 U.S. 241 (1967), where a statute is unambiguous, federal courts may then decide federal constitutional claims. *Zwickler.*

Any and all statutes and/or ordinances must comply with the Due Process Clause of the Fourteenth Amendment. *Stanley* v. *Illinois.* If a statute fails to comply with the Due Process Clause, it is unconstitutional. *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Halbert* v. *Michigan*,

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[13] In a dissenting Opinion, Judge Sawyer of the Michigan Court of Appeals, in *Sterling Bank & Trust* v. *City of Pontiac*, unpublished opinion. No. 249689, determined that MCLA 125.540(2) was unconstitutional as it failed to require notice to the fee title holder of record.

545 U.S. 605 (2005). *Tulsa Professional; Connecticut* v. *Doehr, Peralta.*

The defect in the statute/ordinance in the case at bar is surprisingly similar to that in *Wisconsin* v. *Constantineau.* While in *Constantineau*, the police chief, pursuant to statute, posted notices throughout the town declaring the Ms. Constantineau was a danger to the peace as an excessive drinker, the statute allowed this action. The statute did not provide for any advance notice to Ms. Constantineau prior to the police chief's conduct. Ms. Constantineau challenged the statute asserting it was unconstitutional on its face as it did not afford her with notice and opportunity to challenge the "findings" by the police chief prior to this determination and the posting of this finding throughout the town. This Court struck down the statute as being unconstitutional on its face.

MCLA 125.540 (and the Village ordinance) restrict and limit notice to the taxpayer of record. Obviously, there will be cases where the tax payer record will likewise be the owner of the property and thus, compliance with the statute will result in the appropriate due process notice being provided. In fact while Petitioners acknowledge that it may only be in limited cases where the taxpayer of record is not also the owner, the fact that the statute/ordinance does not mandate notice to the owner, constitutes a violation of Due Process on the face of the statute/ordinance. *Tulsa Professional, Wisconsin* v. *Constantineau.*

Your Petitioner submits that any statutory framework for hearings and the potential determination of the destruction/removal of a building and the assessment of the demolition costs, without the requirement of notice and opportunity to the title holder fails to meet constitutional muster. *Tulsa Professional, Wisconsin* v. *Constantineau.*

While the issue in the instant case may not be as glaring on its face as in *Constantineau*, the fact of the matter remains that any statute/ordinance which can result in the demolition of one's building and the assessment of a lien for the cost of demolition against the real estate, and which does not require written notice to the owner of the property, clearly fails to satisfy the minimum requirements under the Due Process Clause of the Fourteenth Amendment. As such, MCLA 125.540 and the Ordinance of the Village of Capac must be determined unconstitutional.[14]

CONCLUSION

The decision below should be reversed as Petitioners were deprived of their property without due process of law. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" so that such parties may protect their interests. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, it is uncontroverted that the Village of Capac provided no notice of the dangerous building hearings and/or the decision to demolish the building to Petitioners, the fee title holders. In fact, Respondent did not even attempt to provide notice. Respondent Village of Capac asserts that as its ordinance and/or the state statutes do not require notice to Petitioners, there was no due process violation. Because the Village of Capac made no effort to even attempt to provide actual notice to Petitioners, the Village violated the Fourteenth Amendment by failing to take reasonable steps to notify Petitioners of the demolition of their property.

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[14] Interestingly enough, the Michigan legislature under the Michigan Tax Forfeiture Sale Act, MCLA 211.78i requires notification to the property owner before a tax sale can occur.

Respectfully submitted,

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APPENDIX A

MICHIGAN SUPREME COURT
February 27, 2007

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellants,

v.

VILLAGE OF CAPAC,

Defendant-Appellee,

and

DEPARTMENT OF TREASURY,

Defendant.

SC: 131840, 131841
COA: 259536, 259540
St. Clair CC: 04-000508-CC

ORDER

On order of the Court, the application for leave to appeal the June 29, 2006 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2007 /s/Corbin Davis
Clerk

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 29, 2006

No. 259536
St. Clair Circuit Court
LC No. 04-000508-CC

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellants,

v.

VILLAGE OF CAPAC,

Defendant-Appellee,

and

DEPARTMENT OF TREASURY,

Defendant.

No. 259540
St. Clair Circuit Court
LC No. 04-000508-CC

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellees,

v.

VILLAGE OF CAPAC,

Defendant-Appellant,

and

DEPARTMENT OF TREASURY,

Defendant.

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM

In docket number 259536, plaintiffs appeal as of right and challenge the trial court's grant of summary disposition to defendant Village of Capac (defendant) on counts II through V of plaintiffs' complaint. In docket number 259540, defendant appeals as of right and challenges the trial court's grant of summary disposition to plaintiffs on count I of their complaint and removal of a demolition lien defendant had placed on plaintiffs' property. For the reasons set forth in this opinion, we affirm the trial court's granting

of summary disposition to defendants but reverse the trial court's grant of summary disposition to plaintiff.

This case arises from the demolition of a building that was damaged by a fire in November 1999. Plaintiffs owned the land where the building was located, but had entered into a land contract for its sale with Sam Dado, Luay Jeddo, and Salah Hermiz in 1997. In 1998, the vendees' land contract interest was assigned to Holmes Enterprises Incorporated (Holmes). After the fire, repairs were not made to the building and at a village council hearing in March 2002, the building was declared a dangerous building that was to be repaired, demolished, or otherwise made safe. Notice of the hearing was sent to Holmes and posted at the location. Plaintiffs were not sent notice of the hearing.

Holmes unsuccessfully appealed defendant's dangerous building determination to the circuit court. The court entered a judgment against Holmes, allowed the building to be demolished, and awarded a lien against the property for the costs of demolition. On October 23, 2002, defendant had the building demolished. On February 19, 2002, defendant recorded a lien for $51,239 against the property, listing plaintiffs as the owners of the property, subject to Holmes' land contract interest. On March 26, 2003, plaintiffs received possession of the property after a land contract forfeiture action based on non-payment. On March 1, 2004, plaintiffs filed this action against defendant to quiet title and for damages for constitutional violations, inverse condemnation, violation of substantive due process, and trespass.[1] The trial court granted defendant summary disposition on all of plaintiffs' claims except the quiet title

[1] The Complaint also listed the Department of Treasury as a defendant, as apparently the Department filed tax liens against Holmes in January and May 2002. The Department never filed an answer and was defaulted by the trial court.

claim. Subsequently, the trial court determined that the demolition lien was extinguished by plaintiffs' land forfeiture action and removed the lien from plaintiffs' title. Plaintiffs and defendant now appeal.

Plaintiffs argue that the trial court erred in granting summary disposition for defendants on their claims for damages. This Court reviews a trial court's ruling on a motion for summary disposition do novo. *Maskery* v *Univ of Michigan Bd of Regents*, 469 Mich 609, 613, 664 NW2d 165 (2003). Additionally, "whether constitutional due process applies and, if so, has been satisfied are legal questions reviewed de novo." *Reed* v *Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

All of plaintiffs' claims for damages are based on an allegation that plaintiffs were deprived of their procedural due process rights when defendant demolished the building without notice to them. Plaintiffs claim due process requires notice be given to a land contract vendor. Plaintiffs also claim that the village ordinance and the state statute that defendant relied on to give notice are unconstitutional.[2] Plaintiffs' assert that despite the fact Holmes appeared on the tax rolls, and notice of demolition was sent to Holmes and allegedly posted on the building, the village could have easily discovered plaintiffs were the actual title holders and accordingly sent them notice. Failure to undertake this simple step violated plaintiffs' constitutional guarantee of due process.

"The federal and Michigan constitutions guarantee that persons may not be deprived of life, liberty, or property without due process of law." *Hanlon* v *Civil Service Comm*,

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[2] The village ordinance is based on MCL 125.540 and has similar notice requirements. Defendant, however, appeared to have relied on MCL 125.540 when providing notice in this case.

253 Mich App 710, 722; 660 NW2d 74 (2002), citing US Const, Am V; Const 1963, art 1, § 17. The Michigan Constitution, provides no greater due process protection than the federal due process guarantee. *English* v *Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004). When evaluating a due process claim, courts are to first determine "'[w]hether" any procedural protections are due' and then decide[] 'what process is due.'" *Dow* v *Michigan*, 396 Mich 192,203; 240 NW2d 450 (1976), quoting *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972). The United States Supreme Court has determined that the phrase "due process of law" entitles individuals whose property interests, are at stake "to 'notice and an opportunity to be heard.'" *Dusenbery v United States*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002), quoting *United States v James Daniel Good Real Property*, 510 US 43, 48; 114 S Ct 492; 126 L Ed 2d 490 (1993). When determining whether the notice given is sufficient for due process purposes, courts are to determined whether the notice was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity *to* present their objections.'" *Id.* at 168, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314, 319; 70 S Ct 652; 94 L Ed 865 (1950).

Both a titleholder and a land contract purchaser have a due process interest in the property that is the subject of the land contract. *Brandon Twp v Tomkow*, 211 Mich App 275, 282; 535 NW2d 269 (1995). Therefore, it is clear that plaintiffs have a due process interest in the land. However, due process does not require actual notice to an interested party, only that the effort in giving notice be reasonably calculated to apprise interested parties of the action. *Dusenbery, supra* at 170-171. The question becomes

whether defendant's notice to Holmes was constitutionally sufficient.

In this case, defendant sent notice pursuant to, and in compliance with, MCL 125.540 and the trial court found that compliance with the statute was constitutionally sufficient to protect plaintiffs' due process rights. MCL 125.540(2) states that notice must be served on "each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records." Further, MCL 125.540(5) provides that notice should also be *posted* at the building or structure. No one disputes that defendant complied with the statute. However, plaintiffs claim that because they had an interest in the property, they should have received actual notice. We conclude that defendant's compliance with the statute adequately protected plaintiffs' due process rights.

Recently, in *Jones v Flowers*, 547 US ____; 126 S Ct 1708; 164 L Ed 2d 415 (No. 04-1477, decided April 26, 2006), the United States Supreme Court addressed what notice is due to an owner before a state can take property pursuant to a tax sale. In *Jones,* Arkansas sent notice of a delinquency in taxes to the owner by certified mail to the address on the tax records. The notice was returned to the state as unclaimed, and the state sent no further notice to the plaintiff before selling the land in a private sale. *Id.*, slip op at 1-2. *Jones* held "that the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.*, slip op at 4. In reaching this holding, the Court noted that the facts in the case were distinguishable from prior Supreme Court precedent because in the prior cases "the government attempted to provide notice and heard nothing back indicating that anything had gone awry." *Id.*, slip op at 5. The Court also stated that when the government

received the certified letter returned as undeliverable, the government should have taken additional steps to notify the owner, "if practicable to do so." *Id.*, slip op at 12. The Court noted that there were reasonable options for the government in *Jones to* provide notice, such as resending the notice by regular mail, or posting the notice at the property addressed to the occupant. *Id.*, slip op at 13-14. However, the Court also concluded that the government is not required to search for a new address for the property owner. "An open-ended search for a new address--especially when the State obligates the taxpayer to keep his address updated with the tax collector . . .--imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Id.*, slip op, at 14.

Defendant complied with MCL 125.540 by mailing notice to Holmes and posting notice at the building location. Unlike *Jones,* where the state received the notice returned to it as unclaimed, in this case Holmes received the notice and appeared at the hearing. There was nothing to alert defendant that it needed to provide any further notice to another party. Although plaintiffs assert that "[f]or the simple cost of $190.00, [defendant] could have obtained title work and determined the title to the property," the statute does not require defendant to do this. *Jones* stands for the proposition that a governmental entity does not have the obligation to search government records for a new address, and by inference is not required to perform a title search.[3] MCL 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant did not have any indication that the notice it sent did not notify the proper parties. The fact that plaintiffs had

[3] While we hold that plaintiffs' constitutional guarantees of due process were met by defendant, we are sympathetic to plaintiffs' argument that the village should be mandated to perform a simple title search. Based on current case law, such change must emanate from the legislature.

an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of MCL 125.540 are constitutionally insufficient.[4]

Therefore, because plaintiffs' claims for damages were all based on alleged violations of due process and because we determine that defendant complied with constitutional standards of due process when sending notice, the trial court properly granted defendant summary disposition.[5] To the extent that plaintiffs raise a facial challenge to the constitutionality of MCL 125.540, we conclude that in most instances notice provided pursuant to the statute will provide actual notice to the property owner, and therefore, plaintiffs' facial challenge fails. See *Council of Organizations v Governor,* 455 Mich 557, 568; 566 NW2d 208 (1997) (noting that a party challenging the facial constitutionality of a statute must show that there are no circumstances in which the statute would be valid).

Defendant argues on appeal that the trial court erred in concluding that plaintiffs' land contract forfeiture extinguished the demolition lien. We review a motion to quiet title de novo. *Fowler v Doan,* 261 Mich App 595, 598; 683 NW2d 682 (2004). Initially, we note that the trial court correctly concluded that MCL 125.541 governed the lien in this can. However, we conclude that the trial court erred when it found that plaintiffs' land contract interest was a prior lien or encumbrance that would take priority over defendant's demolition lien.

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[4] The record is not entirely clear how plaintiffs did receive notice, however we note that plaintiffs attempted to intervene in the underlying action, but according to plaintiffs' counsel, by the time plaintiffs discovered the proceeding, the trial court had already ruled that the village was entitled to demolish the building.

[5] In light of our conclusion, we also conclude that the trial court properly denied plaintiffs' motion for reconsideration.

According to the statute, defendant's demolition lien is subject to any prior recorded lien or encumbrances. MCL 125.541(6). Our Supreme Court has defined a lien or encumbrance as follows:

> In *Post v Campau*, 42 Mich 90, 94-95; 3 NW 272 (1879), we defined an encumbrance to include anything which
>
> > "constitutes a burden upon the title; a right of way,. . . a condition which may work a forfeiture of the estate, . . . a right to take off timber, . . . a right of dower, whether assigned or unassigned . . . . In short, 'every right to, or interest in the land, to the diminution of the value of the land, *but consistent with the passage of the fee by the conveyance.*'" (Emphasis supplied.)
>
> Hence, although an encumbrance is typically adverse to the interest of the landowner, it does not conflict with his conveyance of the land in fee. A lien is one type of encumbrance. *[Darr v First Fed S & L Ass'n of Detroit,* 426 Mich 11, 20; 393 NW2d 152 (1986).]

Plaintiffs' interest in the land initially was that of a land contract vendor, with Holmes as the land contract vendee. Therefore, before the land contract forfeiture, plaintiffs held legal title in the land subject to Holmes' equitable interest. *Id.* at 19-20. This type of fee interest is not equivalent to a lien or encumbrance on the property. See *id.* at 21 (stating that "[a] land contract vendee's or vendor's lien is not a property right in or right to the land itself, it constitutes instead, a charge or security in the land."). Therefore, the

trial court erred when it determined that plaintiffs' fee interest was a prior recorded encumbrance on the land that was superior to defendant's demolition lien.

Plaintiffs argue that the lien only attached to Holmes equitable interest and not to the land. However, defendant's lien attached to the property itself, not just Holmes' equitable interest. MCL 125.541(7); see also *Franken Investments, Inc v Flint,* 218 F Supp 2d 876, 882 (ED Mich, 2002) (stating that "[d]emolition costs are 'charged against the land' if the requirements of . . . [the statute] are met."). The land contract forfeiture proceedings removed Holmes equitable interest and any encumbrances that attached to it could not remove defendant's lien, which attached to the property itself.

MCL 125.541(6) states that a lien for demolition costs shall "be collected and treated in the same manner as provided for property tax liens under the general property tax act [MCL 211.1 *et seq].*" MCL 211.40 states, in part, that a lien for real estate or personal property taxes "shall continue until paid." Plaintiff argues MCL 211.40 does not apply to defendant's lien for demolition costs because it does not address "the collection" of a lien. However, MCL 211.40 does address the treatment of a lien. Further, contrary to plaintiffs' argument, MCL 211.40, combined with the language of MCL 125.541(6), does not limit its application to only special assessments or tax liens. MCL 125.541(6) states that, even though the demolition lien is not a special assessment or a tax lien, it is to be treated as provided in the General Property Tax Act. Again MCL 211.40 states that the lien is to continue until paid. Therefore, because plaintiffs have not shown a prior recorded encumbrance on the land or that the lien was attached only to Holmes' equitable interest under the land contract, defendant's lien for demolition costs was not extinguished by the land

contract forfeiture action and according to MCL 211.40, continues until paid. Therefore, the trial court erred in removing the demolition lien from plaintiffs' title.

Plaintiffs argue that allowing the demolition lien to remain on their title without notice of the hearing in which the lien was issued violates their due process rights. However, we previously concluded that the notice defendant gave complied with due process. Plaintiffs also argue that MCL 125.541 is unconstitutional, making an identical challenge to the challenge discussed previously regarding MCL 125.540. Therefore, for the same reasons discussed in reference to MCL 125.540, we conclude that plaintiffs have not shown that MCL 125.541 is unconstitutional. In light of our conclusions, we also need not reach defendant's argument that res judicata barred this action.

Affirmed in part, reversed in part, and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/Jessica R. Cooper
/s/Janet T. Neff
/s/Stephen L. Borrello

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan Municipal Corporation, and MICHIGAN DEPARTMENT OF TREASURY, an Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

ORDER GRANTING DEFENDANT VILLAGE OF CAPAC'S MOTION FOR SUMMARY DISPOSITION AS TO COUNTS II THROUGH V

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At a session of said Court, continued and held at the County Building, City of Port Huron, County and State aforesaid, this 14th day of June, 2004.

PRESENT: Hon. Daniel J. Kelly, Circuit Judge

This matter having come before the Court on Defendant Village of Capac's Motion for Summary Disposition, pursuant to MCR 2.116(c)(7) & (10), briefs having been submitted by the parties, oral arguments having been taken, and the Court having issued a written Opinion dated May 17, 2004, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Defendant Village of Capac's Motion for Summary Disposition, pursuant to MCR 2.116(c)(10) [res judicata] is hereby denied for reasons more fully set forth in the Opinion of the Court dated May 17, 2004, which is hereby incorporated by reference.

IT IS HEREBY ORDERED that Defendant Village of Capac's Motion for Summary Disposition, pursuant to MCR 2.116(10) as it relates to Counts II, III, IV and V be and same is hereby granted for the reasons more fully set forth in the Court's Opinion dated May 17, 2004.

This Order only resolves Counts II, III, IV and V. Count I of Plaintiff's Complaint still remains unresolved and the case remains open.

/s/Daniel J. Kelly
HON. DANIEL J. KELLY
Circuit Judge

Approved for Entry as to form only:

/s/David R. Heyboer
DAVID R. HEYBOER (P-27975)
Attorney for Plaintiff

/s/James E. Tamm
JAMES E. TAMM (P-38154)
Attorney for Def. Capac Only

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan Municipal Corporation, and MICHIGAN DEPARTMENT OF TREASURY, an Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

OPINION ON MOTION FOR SUMMARY DISPOSITION
May 17, 2004

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4111 Andover Road, Ste. 300 East

Bloomfield Hills, MI 48302
(248) 433-2000

This case arises out of the demolition of a fire-damages building located at 101-13 S. Main Street in the Village of Capac. Plaintiffs, Bernard and Karen Penzien, are assignees of the Bernard P. Penzien Revocable Living Trust, which sold the property on land contract to Sam Dado in 1997. The terms of the land contract provided that the purchaser would pay all taxes and assessments levied on the premises and keep the buildings on the premises insured against loss and damage. Mr. Dado subsequently assigned his purchaser's interest in the land contract to Holmes Enterprises in 1998 in a document that was prepared, witnessed, and signed by Bernard Penzien, who is an attorney in Imlay City.

In 1999, the building at 101-103 S. Main Street caught fire. On March 18, 2002, the Capac Village Council held a public hearing at which it was determined, based on a report from Dunn Engineering, that the building had serious structural defects as a result of the fire, and was a "dangerous building as defined by the Capac Ordinances." The Village sent notice to Holmes Enterprises, pursuant to local ordinance, because Holmes was the entity that appeared on the local tax assessment records. Holmes was then given twenty days to repair, demolish, or make the building safe. No notice of any kind was ever sent to the Penziens.

Holmes challenged the Village's determination in Circuit Court, arguing that the Village's determination about the building was arbitrary and capricious, thereby violating Holmes' due process rights. The Village prevailed in this action, and the Court issued an order on September 19, 2002, stating that Holmes was to tear down the building, or allow

the Village to do so at Holmes' expense. Plaintiffs were not a party to this action in Circuit Court. The building was torn down by the Village on October 23, 2002, and a dangerous building assessment lien was placed on the property on February 19, 2003, in the amount of $51,239.00, which represents the cost of the removal of the building.

Some time after the building was torn down, Holmes failed to make payments to Plaintiffs on the land contract, and Plaintiffs commenced a land forfeiture action against Holmes, the Village of Capac, and the State of Michigan on January 7, 2003. A Judgment was entered on March 26, 2003, setting forth a redemption amount of $54,510.50 and entitling Plaintiffs to possession of the property. On June 26, 2003, at the end of the 90-day statutory redemption period, a Writ of Restitution was issued, removing Holmes from the property.

Plaintiffs filed their Complaint in the instant suit on March 1, 2004, seeking to quiet title to the property by removing the tax assessment filed by the Village. Plaintiffs are also seeking damages based on allegations that the Village violated their due process rights when it did not give notice of its intention to demolish the building to Plaintiffs. Defendants filed the Motion for Summary Disposition in this case under MCR 2.116(C)(7) and (C)(10), arguing that they were only required by law to give notice to Holmes, and that Plaintiffs' claims are barred by the doctrine of res judicata. Plaintiffs have indicated in their response that they agree that no material issue of fact exists in this case; but Plaintiffs content that they are entitled to summary disposition. Not Defendants. For the reasons set forth more fully below, this Court finds that Defendants are not entitled to summary disposition under MCR 2.116(C)(7); however, summary disposition in favor of Defendants is appropriate under MCR

2.116(C)(10) as to Counts II through V of Plaintiffs' Complaint.

Both parties have extensively briefed the issue of whether this action is barred by the doctrine of res judicata. The doctrine of res judicata acts to bar the re-litigation of actions that have previously been reduced to a final judgment. This doctrine applies when 1) the prior action was decided on the merits; 2) the decree in the prior action was a final decision; 3) the matter contested in the second case was or could have been resolved in the first action; and 4) both actions involved the same parties or their privies. Michigan law defines res judicata broadly to preclude all claims actually litigated in the first action, as well as all claims that could have, with reasonable diligence, been raised but were not. *Dart v Dart*, 460 Mich 573 (19991). A prerequisite to a party's ability to invoke the doctrine of res judicata in a subsequent proceeding is that the party must have given adequate notice of the prior proceeding to the persons who are to be bound by the adjudication. *Viele v DCMA Intern, Inc.*, 211 Mich App 458 (1995).

Plaintiffs were not made a party to the prior action, and in order to find privity between a party and a nonparty, Michigan courts require "both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v Rogers*, 229 Mich App 547, 553-54 (1998). In this case, Plaintiffs' interests were clearly not presented or protected by any party in the prior litigation in Judge Deegan's court. It appears from the materials submitted to this Court that Plaintiffs' interest in the property was never mentioned at any point. As Holmes and Plaintiffs cannot be considered to be the same party, or privies of each other, res judicata will not bar

Plaintiff's claim in the present suit. Therefore, summary disposition under MCR 2.116(C)(7) is improper.

Defendants have also moved for summary disposition under MCR 2.116(C)(10) on grounds that no material issue of fact remains and they are entitled to judgment that they did not violate Plaintiffs' due process rights as a matter of law. Plaintiffs contend that they were entitled to some sort of notice as the legal title holder of the property, and that merely sending notice to Holmes, the equitable owner, was insufficient to apprise Plaintiffs of their opportunity to be heard as an owner of the property. The Capac Village Code provides that when the whole or any part of any building or structure is found to be in a dangerous condition, notice shall be directed to the person in whose name the property appears on the most recent Village tax assessment records. Capac Village code, Article III., § 6-68. The Michigan Housing Code mirrors the Village ordinance, and states that notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency, and if an owner, agent, or lessee is not registered, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records. MCL 125.540.

The Village proceeded in giving notice in accordance with these authorities, and the method of mailing notice to the person listed on the tax assessment records has been upheld as constitutionally sufficient, even though that person is not the actual property owner. *Toussaint v City of Sterling Heights*, unpublished opinion per curiam of the Court of Appeals, decided May 15, 2003 (Docket No. 230265). The *Toussaint* case, although unpublished, is nevertheless instructive to this Court, because it deals with what notice is required for the removal of a dangerous condition where an owner's entire interest is not lost, as opposed to the notice

required in a tax sale where the entire interest in the property is at stake. In addition, *Toussaint* addresses a situation where notice was at least given to the party listed in the tax assessment records, where as many of the cases cited by Plaintiffs involve situations where no notice was given to anyone.

In the case before this Court, the land contract provided that the vendee wold be responsible for paying the taxes, and as a result, Holmes' name appeared in the tax records. The Village provided notice to Holmes in accordance with § 6-68 of the Capac Village Code and MCL 125.540. Under the circumstances of this case, such notice was constitutionally sufficient, especially in light of the fact that Plaintiffs were aware that the property had been damaged and were also aware that the Village had declared it a dangerous building. Therefore, there has been no violation of Plaintiffs' due process rights, and Defendants are entitled to judgment as a matter of law under MCR 2.116(C)(10) on these claims, which are set forth in Counts II, III, and IV of Plaintiff's Complaint. Consequently, Plaintiff is not entitled to any damages on these Counts.

As for Count V of Plaintiffs' Complaint, entitled "Trespass," Defendants are also entitled to judgment as a matter of law under MCR 2.116(C)(10), as Defendants entered the property at 101-103 S. Main Street pursuant to an order issued by Judge Deegan, which affirmed the decision of the Village of Capac to demolish the unsafe and dangerous building on the premises. Therefore, Plaintiffs are not entitled to damages for trespass.

With regard to Count I of Plaintiffs' Complaint, which contains the quiet title action, the Court will defer ruling on Defendant's motion for summary disposition on this issue. Plaintiffs' Complaint alleges that the liens of

Defendants are no longer of any force and effect because they did not redeem the amount necessary under the land contract. Plaintiffs request that this Court enter an order quieting title and declaring that these Defendants have no interest in the property. While Defendants appear to be seeking summary disposition on all counts, they have not set forth any arguments with regard to this particular issue; specifically, whether the tax liens of Defendants remain valid after the forfeiture of the land contract and the end of the redemption period when they did not redeem their interests. The parties may submit briefs on this issue within thirty days of the date of this Opinion, and may schedule oral arguments on this limited issue if they find it necessary.

For the reasons set forth above, Defendant's Motion for Summary Disposition is GRANTED as to Counts II through V of Plaintiff's Complaint. A separate Opinion will be issued with regard to Count I when supplemental materials are received from the parties. An order consistent with this Opinion may be presented for entry as provided by court rule.

Dated: 5-17-04 /s/Daniel J. Kelly
Hon. Daniel J. Kelly, Circuit Judge

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION, AS TO COUNT I JUDGMENT QUIETING TITLE REGARDING VILLAGE OF CAPAC, ONLY

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JAMES E. TAMM (P-38154)
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4111 Andover Road, Ste. 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

At a session of said Court, continued and held at the County Building, City of Port Huron, County and State aforesaid, this 24th day of November, 2004.

PRESENT: Hon. Daniel J. Kelly, Circuit Judge

This matter having come before the Court on Plaintiff's Motion for Summary Disposition on Count I of Plaintiff's Complaint, and the Court having issued an Opinion dated October 26, 2004, a copy of which is incorporated by reference, and the Court's Opinion having addressed the continued validity of Defendant Capac's liens, which are the subject matter of Count I of Plaintiff's Complaint, and the Court further finding that the liens of the Defendant Village of Capac do constitute an impediment and cloud against Plaintiffs' title and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff's Motion For Summary Disposition as to Count I of Plaintiff's Complaint against Defendant Capac be and same is hereby granted for the reasons more fully set forth in the Opinion of this Court, dated October 26, 2004.

IT IS FURTHER ORDERED AND ADJUDGE that any and all liens and/or Judgments filed by or on the behalf of Defendant Village of Capac, against the subject real estate, including those recorded at Liber 2531, page 150; and Liber

2649, page 1, St. Clair County Records, be and same are hereby cancelled, discharged, released, and shall be of no further force and effect against Plaintiffs' property described as:

> Land in the Village of Capac, St. Clair County, Michigan, described as:
> The East 114 feet of Lot 1 and the East 114 feet of the North 10 feet of Lot 2, Block 1 North, Range 1 West, except the West 12 feet of Right-of-Way, Village of Capac, according to the plat thereof as recorded in Liber H of Plats, page 72, St. Clair County Register of Deeds Office.
> and commonly known as 101-105 S. Main Street, Capac, Michigan, tax id. # 74-27-950-0202-000.

IT IS FURTHER ORDERED that the Village of Capac and the St. Clair County Treasurer shall remove the sum of $51,602.83, from the 2003 July tax bill, (a copy of which is attached hereto and incorporated by reference), plus any and all ancillary fees and expenses in connection therewith, (collection fees, administrative fees, interest, penalties, etc.), to the same effect as if the said $51,602.83 was never added to the July 2003 tax bill.

IT IS FURTHER ORDERED that Plaintiff's request for attorney fees is denied for the reasons more fully set forth in the Opinion of this Court dated October 26, 2004.

IT IS FURTHER ORDERED that nothing herein shall discharge, release and/or other abrogate any liability which Holmes Enterprises, Inc., may have to the Village of Capac pursuant to St. Clair County Circuit Court action Holmes Enterprises v Village of Capac, St. Clair County Circuit Court No. 02-0934-CZ.

This Judgment resolves the last pending claim and closes the case.

/s/Daniel J. Kelly
HON. DANIEL J. KELLY
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

OPINION ON MOTION FOR
SUMMARY DISPOSITION
October 26, 2004

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(248) 433-2000

Plaintiffs, Bernard and Karen Penzien, have filed the instant Motion for Summary Disposition, the third summary disposition motion in this case. The facts as set forth in the parties' briefs and also in previously Opinions issued by this Court are not in dispute and need not be restated here. The only remaining issue before this Court involves Count I or Plaintiffs' Complaint, the quiet title claim.

In its previous Opinion, this Court found that the manner in which Defendant Village of Capac provided notice of the dangerous building satisfied the requirements of MCL 125.541, but not MCL 125.534; and therefore, the effect of the resulting lien place on the property would be determined by the provisions in MCL 125.541. Subsection (7) of MCL 125.541 provides that a lien may be placed on the real property pursuant to a judgment. Judge Deegan issued an Order in case number 02-0934-CZ providing for such a lien. This Court does not question the validity of Judge Deegan's Order, nor the reasoning behind it. Furthermore, this Court does not attempt to "overrule" the Order, or to interfere with Judge Deegan's jurisdiction in the case between Holmes Enterprises and the Village of Capac. Subsection (7) expressly provides for such a lien to be placed. This subsection, however, clearly states that such a lien "does not have priority over prior filed or recorded liens and encumbrances." MCL 152.541(7). Therefore, Capac's lien would be considered a junior lien on the property. The effect of the land contract forfeiture on this junior lien is similar to what would occur when a bank forecloses a mortgage on the property that is also encumbered by liens that are junior to the mortgage: all of the junior interests are extinguished unless redeemed. There is no dispute in this

case that redemption did not occur. The line placed on the property by the Village of Capac in this case was not extinguished by any action of this Court. Rather, it was left without any force or effect because Capac did not redeem in the forfeiture process. Therefore, it now constitutes a cloud on the Penziens' title, and they are entitled to have the lien removed from the property.

Plaintiffs have also requested in their summary disposition motion that a hearing be held to determine damages and attorney fees on a slander of title theory. There has been no showing that the Village of Capac slandered Plaintiffs' title. As is evidenced by the extensive briefs filed by the parties, and the amount of time this Court has spent considering the legal issues therein, there are certainly two ways of viewing this case. Although this Court ultimately disagreed with the legal arguments set forth by the Village of Capac, it is clear that Capac's attorneys proceeded based on legitimate interpretations of the law. Capac should not be forced to pay damages and attorney fees based on a slander of title theory for what appears to this Court to be a good faith pursuit of an arguable legal position.

For the reasons set forth above, Plaintiffs' Motion for Summary Disposition is GRANTED as to Count I of Plaintiff's Complaint; however, no hearing will be held on the issue of damages or attorney fees, as this Court has found that Plaintiffs are not entitled to them. An order consistent with this Opinion may be presented for entry as provided by court rule.

Dated: 10-26-04 /s/Daniel J. Kelly
Hon. Daniel J. Kelly, Circuit Judge

APPENDIX E

CAPAC VILLAGE CODE
ARTICLE III. DANGEROUS BUILDINGS

Sec. 6-68. Notice.

When the whole or any part of any building or structure is found to be in a dangerous condition, the building inspector shall issue a notice which shall specify the nature of the dangerous condition and the repair or demolition necessary to make the building or structure safe.

(1) The notice shall be directed to the person in whose name the property appears on the most recent village tax assessment records.

(2) The notice shall specify the time and place of a hearing before the village council at which the person to whom the notice was directed shall have the opportunity to contest the findings of the building inspector.

(Ord. No. 90-3, §3, 7-16-1990)

* * *

(b) If it is determined by the village council that the building or structure should be repaired, demolished or otherwise made safe, it shall so order, fixing a time within which compliance must be completed.

(c) A copy of the decision of the village council shall be sent by regular mail or otherwise delivered to the person to whom the original notice was sent.

(Ord. No. 90-3, §5, 7-16-1990)

* * *

Sec. 6-72 Failure to comply; lien.

If the responsible persons do not comply with the village council's decision within the time specified, the village may arrange to have the required repair, demolition or other work completed. The cost of such required repair, demolition or other work shall be a lien against the real property on which the building or structure is located and shall be assessed against such real property on the next tax roll.

(Ord. No. 90-3, §7, 7-16-1990)

Sec. 6-73. Appeal to circuit court.

A person affected by a village council decision requirement the repair, demolition or other work on a building or structure, in which such person has an interest, may appeal the decision to the circuit court by filing an action within 20 days from the date of the decision by the village council.

(Ord. No. 90-3, §8, 7-16-1990)

APPENDIX F

MCLA 125.532:

Sec. 132. (1) If, upon inspection, the premises or any part of the premises are found to be in violation of any provision of this act, the enforcing agency shall record the violation in the registry of owners and premises.

(2) The owner, and, in the enforcing agency's discretion, the occupant, shall be notified in writing of the violation. The notice shall state the date of the inspection, the name of the inspector, the nature of the violation, and the time within which the correction shall be completed.

MCLA 125.534:

(1) If the owner or occupant fails to comply with the order contained in the notice of violation, the enforcing agency may bring an action to enforce this act and to abate or enjoin the violation.

* * *

(4) Owners and lienholders of record or owners and lienholders ascertained by the complainant with the exercise of reasonable diligence shall be served with a copy of the complaint and a summons. The complainant shall also file a notice of the pendency of the action with the appropriate county register of deeds office where the premises are located.

MCLA 125.540

Sec. 140 (1) Notwithstanding any other provision of this act, if a building or structure is found to be a dangerous building, the enforcing agency shall issue a notice that the building or structure is a dangerous building.

(2) The notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency under section 125. If an owner, agent, or lessee is not registered under section 125, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records.

* * *

(5) The notice shall be in writing and shall be served upon the person to whom the notice is directed either personally or by certified mail, return receipt requested, addressed to the owner or party in interest at the address shown on the tax records. If a notice is served on a person by certified mail, a copy of the notice shall also be posted upon a conspicuous part of the building or structure. The notice shall be served upon the owner or party in interest at least 10 days before the date of the hearing included in the notice."

MCLA 125.541

(2) If the hearing officer determines that the building or structure should be demolished, otherwise made safe, or properly maintained, the hearing officer shall so order, fixing a time in the order for the owner, agent, or lessee to comply with the order. If the building is a dangerous building under section 139(j) . . . .

* * *

(4) The legislative body or the board of appeals of the city, village, or township, as applicable, shall fix a date not less than 30 days after the hearing prescribed in section 140 for a hearing on the findings and order of the hearing officer and shall give notice to the owner, agent, or lessee in the manner prescribed in section 140 of the time and place of the hearing. . . . If the legislative body or board of appeals approves or modifies the order, the legislative body shall take all necessary action to enforce the order. If the order is approved or modified, the owner, agent, or lessee shall comply with the order within 60 days after the date of the hearing under this subsection.

* * *

(5) The cost of the demolition . . . shall be reimbursed to the city, village, or township by the owner or party in interest in whose name the property appears.

(6) The owner or party in interest in whose name the property appears upon the last local tax assessment records shall be notified by the assessor of the amount of the cost of the demolition, of making the building safe, or of maintaining the exterior of the building or structure or grounds adjoining the building or structure by first class mail at the address shown on the records. If the owner or party in interest fails to pay the cost within 30 days after mailing by the assessor of the notice of the amount of the cost, the city, village, or township shall have a lien for the cost incurred by the city, village, or township to bring the property into conformance with this act. The lien shall not take effect until notice of the lien has been filed or recorded as provided by law. A lien provided for in this subsection does not have priority over previously filed or recorded liens and encumbrances. The lien for the cost shall be collected and treated in the same manner as provided for property tax liens under the general property tax act, Act No. 206 of the Public

Acts of 1893, being sections 211.1 and 211.157 of the Michigan Compiled Laws.

(7) In addition to other remedies under this act, the city, village, or township may bring an action against the owner of the building or structure for the full cost of the demolition, of making the building safe, or of maintaining the exterior of the building or str5ucture or grounds adjoining the building or structure. A city, village, or township shall have a lien on the property for the amount of a judgment obtained pursuant to this subsection. The lien provided for in this subsection shall not take effect until notice of the lien is filed or recorded as provided by law. The lien does not have priority over prior filed or recorded liens and encumbrances.

APPENDIX G

DETERMINATION OF CAPAC VILLAGE COUNCIL AFTER DANGEROUS BUILDING HEARING REGARDING 101 AND 103 SOUTH MAIN STREET, CAPAC

At a hearing and meeting of the
Council of the Village of Capac
held March 18, 2002

A report of the Building Inspector of the Village of Capac dated January 7th,2002 and the report of Dunn Construction and Engineering dated February 18th, 2002 having been presented to the Village of Capac Village Council by the Village Building Inspector, finding the building at 103 Main Street, Capac, Michigan, to be a dangerous building as defined by Capac Village Ordinance Article III, Section 6-6 *et seq*, and notice having been served pursuant to Capac Village Ordinance to the person whose name the property appears in the most recent Village Tax Assessment records and also posted at 103 South Main Street,, Capac, Michigan, all interested parties having been allowed to appear and be heard and after full consideration of report and recommendation of the Capac Building Inspector,

IT IS HEREBY DETERMINED for the health, safety and welfare of the residents of the Village of Capac and the general public pursuant to article III, Section 6-6 *et seq* that:

1. The building located at and commonly referred to as 101 and 103 South Main Street, Capac, Michigan, is a dangerous building as defined by the Capac Ordinances. Said premises being more specifically described as those premises situated in the Village of Capac, St. Clair County, Michigan, to-wit:

Lot 1, except the West 36 feet thereof also the North 10 feet of the East 114 feet of Lot 1, B1S, R1W, Part of the Village of Capac.

2. Said building is determined to be a dangerous building as defined by ordinance shall be repaired, demolished or otherwise made safe.

3. The owner shall repair, demolish or make safe said or building within twenty (20) days from the date of this determination.

4. If the owner or other interested party fails to repair, demolish or otherwise make safe said building within the twenty (20) day time period, upon the recommendation of the Capac Building Inspector, the Village shall demolish said building with the cost of such demolition work to be made a lien against the real property on which the building is located and assessed against the real property on the next tax roll.

5. A person affected by a Village Council decision requiring the repair, demolition or other work on a building or structure in which such person has an interest, may appeal the decision to the circuit court by filing an action within 20 days from the date of this decision by the Village Council.

/s/Bruce Lawrence
BRUCE LAWRENCE, President

/s/Debra L. Hlubic
DEBRA L. HLUBIC, Clerk

I hereby certify that the foregoing constitutes a true and complete copy of a Determination of Capac Village Council after Dangerous Building hearing Regarding 101 and 103 South Main Street, Capac, Michigan adopted by the Council of the Village of Capac, County of St. Clair, Michigan, at a hearing held on March 18th, 2002, and that said hearing was conducted and public notice of said meeting was given pursuant to and in full compliance with the Open Meetings Act, being Act 267, Public Acts of Michigan, 1976, and that the minutes of said meeting were kept and will be or have been made available as required by said Act.

/s/Debra L. Hlubic
DEBRA L. HLUBIC, Clerk

APPENDIX H

BOOK 2649 PAGE 01
CLERK REGISTER
ST. CLAIR COUNTY

RECEIVED FOR RECORD
FEB. 19 2003
LIBER 2649 PAGE 1 TIME 8:20 A.M.

/s/Marilyn Dunn
MARILYN DUNN

DANGEROUS BUILDING ASSESSMENT LIEN

Notice is hereby given that on March 18, 2002, the Village of Capac, Village Counsil determined the following property to be a dangerous building as defined by Capac Village Ordinance Article III, Section 6-6 *et seq*:

> Lot 1, except the West 36 feet thereof also the North 10 feet of the East 114 feet of Lot 1, B1S, R1W, Part of the Village of Capac.

As of February 3, 2003, the Village of Capac hereby places a lien pursuant to village ordinance in the amount of fifty one thousand two hundred thirty-nine ($51,239.00), plus future costs, attorney's fees, interest, penalties and fees. Owner: Bernard P. Penzien and Karen S. Penzien, husband and wife; Subject to the Land Contract Purchasers interest of Holmes Enterprises, Inc.

Village of Capac

/s/Debra L. Hlubic
by: Debra L. Hlubic
Its: Clerk
131 North Main Street
Capac, Michigan 48014

State of Michigan)
County of St. Clair)

Subscribed and sworn to before me this 2/03/03.

/s/Keith D. Zick
Keith D. Zick
Notary Public-St. Clair County, Michigan
My commission expires: 7-6-04

Prepared by and return to:
Keith D. Zick
Michael L. Hulewicz
BEAUCHAMP, KELLY, WHIPPLE, ZICK,
KEYES & HULEWICZ
627 Fort Street
Port Huron, Michigan 48060
(810) 987-4111

APPENDIX I

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

AFFIDAVIT

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Bloomfield Hills, MI 48302
(248) 433-2000

STATE OF MICHIGAN)
) **AFFIDAVIT**
COUNTY OF ST. CLAIR)

Bernard Penzien, being duly sworn, deposes and says:

1. That he is the owner of real estate described as: Land in the Village of Capac, St. Clair County, Michigan, described as:

> The East 114 feet of Lot 1 and the East 114 feet of the North 10 feet of Lot 2, Block 1 North, Range 1 West, except the West 12 feet of Right-of-Way, Village of Capac, according to the plat thereof as recorded in Liber H of Plats, page 72, St. Clair County Register of Deeds Office.

and commonly known as 101-105 S. Main Street, Capac, Michigan.

2. That on March 4, 1997, the property in question was owned by the Bernard Penzien Trust and was sold to Sam Dado and others under a land contract.

3. That on April 11, 1997, the Bernard Penzien Trust transferred the property to Bernard Penzien and Karen Penzien, husband and wife.

4. That on November 11, 1999, the original land contract vendees, Sam Dado, et al., did assign the land contract to Holmes Enterprises.

5. That your Affiant is an attorney at law doing business in Imlay City, Michigan.

6. That at no time did Affiant receive any notice from the Village of Capac regarding the issues concerning the allegations of a dangerous building or the hearing to order the demolition of the building.

7. That at no time did Affiant receive notice of the lawsuit which was pending before the Honorable Peter E. Deegan.

8. That on October 23, 2002, Affiant was informed that work crews on behalf of the Village of Capac had commenced demolition of the building.

9. That prior to October 23, 2003, Affiant had hired attorney David R. Heyboer to proceed with a land contract forfeiture, and due to the issues surrounding a potential of State and/or Federal tax liens against the interest of Sam Dado, et al., and Holmes Enterprises, David R. Heyboer did order title work to determine the exact status of the title, as well as any other interests against the property.

10. That on October 23, 2002, attorney David R. Heyboer, upon being informed of the demolition, did demand in writing that the demolition immediately cease, to which the Village of Capac refused.

11. That the building was torn down and in a pile of rubble on Thursday morning, October 24, 2002, when Plaintiffs sought to intervene, all of which was then a nullity.

12. That in March 2003, the Village of Capac placed a special assessment against the property and mailed a copy to Affiant, despite the fact that the land contract interest of Holmes Enterprises remained in full force and effect.

/s/Bernard Penzien
BERNARD PENZIEN

Subscribed and sworn to before me this 3rd day of May, 2004.

/s/Debra L. Sutherby
Debra L. Sutherby, Notary Public
Lapeer County, Michigan
My commission expires: 07-1-05

APPENDIX J

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan Municipal Corporation, and MICHIGAN DEPARTMENT OF TREASURY, an Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

AFFIDAVIT

DAVID R. HEYBOER (P-27975)
Attorney for Plaintiffs
Heyboer & Floyd, P.L.L.C.
1530 Pine Grove Avenue, Suite 5
Port Huron, MI 48060
(810) 982-5400

JAMES E. TAMM (P-38154)
Attorney for Defendant Village of Capac
O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

4111 Andover Road, Ste. 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

STATE OF FLORIDA)
)
COUNTY OF PINELLAS)

AFFIDAVIT

Karen Penzien, being duly sworn, deposes and says:

1. That she is the co-owner of the property which is the subject of this litigation and with an interest as tenants by the entirety.

2. That Karen Penzien is the spouse of Bernard Penzien.

3. That at no time has Karen Penzien received any notice from the Village of Capac by mail or otherwise concerning the issues regarding the Village's dangerous building ordinance and/or requests to demolish the property.

4. That at no time whatsoever did Karen Penzien ever receive notice that a lawsuit was pending before the Honorable Peter E. Deegan.

/s/Karen Penzien
KAREN PENZIEN

Subscribed and sworn to before me this 9th day of May, 2004.

/s/Susan Harris
Susan Harris, Notary Public
Pinellas County, Florida
My commission expires: August 15, 2006

APPENDIX K

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

AFFIDAVIT

DAVID R. HEYBOER (P-27975)
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4111 Andover Road, Ste. 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

STATE OF MICHIGAN)
) **AFFIDAVIT**
COUNTY OF ST. CLAIR)

David R. Heyboer, being duly sworn, deposes and says:

1. That he is the attorney for Plaintiffs.

2. That he has reviewed the real property tax roll for Capac as submitted to the County by the Village of Capac.

3. That the 1996 tax roll documents on the records of the St. Clair County Treasurer, effective June 21, 1996, for the property which is the subject matter of this litigation, was under the name of Bernard Penzien.

4. That the 1997 tax roll documents on the records of the St. Clair County Treasurer, effective June 17, 1997, for the property which is the subject matter of this litigation, was under the name of Bernard Penzien.

5. That the 1998 tax roll documents on the records of the St. Clair County Treasurer, effective June 22, 1998, for the property which is the subject matter of this litigation, was under the names of Bernard and Karen Penzien.

6. That the 1999 tax roll documents on the records of the St. Clair County Treasurer, effective June 23, 1999, for the property which is the subject matter of this litigation, was under the name of Holmes Enterprises.

7. That the subsequent tax years remained in the name of Holmes Enterprises.

/s/David R. Heyboer
DAVID R. HEYBOER (P-27975)

Subscribed and sworn to before me this 27 day of April, 2004.

/s/Julie J. Kuehn
Julie J. Kuehn, Notary Public
St. Clair County, Michigan
My commission expires: 05-7-05

APPENDIX L

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN,

Plaintiff,

vs.

VILLAGE OF CAPAC and MICHIGAN DEPARTMENT OF TREASURY,

Defendants.

Case No. 04-000508-CC
Hon. Daniel J. Kelly

TRANSCRIPT

MOTIONS BEFORE THE HONORABLE DANIEL J. KELLY, CIRCUIT JUDGE
Port Huron, Michigan - Monday, May 10, 2004

APPEARANCES:

For the Plaintiff: DAVID R. HEYBOER (P27975)
Law Offices of Heyboer & Floyd
1530 Pine Grove Avenue
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Port Huron, MI 48060
(810) 982-5400

For Defendant Village of Capac
JAMES E. TAMM (P-38154)
O'Connor, DeGrazia & Tamm P.C.
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REPORTED BY:
Pamela Lindsay, CSR & CER 5211
Certified Shorthand Reporter
(586) 447-3800

[By James Tamm, Counsel for Defendant Capac]

Very briefly, your Honor, I think this is -- is adequately addressed in our papers, but as Mr. Heyboer indicated this is an action that resulted when property located in the Village of Capac burned. Mr. Penzien was the Land Contract vendor. The Land Contract vendee was Holmes Enterprises. Mr. Penzien had assigned that Land Contract to Holmes enterprises, and by virtue of that Land Contract Holmes Enterprises was required to be the taxpayer. They were the taxpayer of record. Under both State Law and Village Ordinance the taxpayer of record is the individual who received notice as to dangerous buildings. Notice was appropriately given.

* * *

Plaintiffs' particular argument -- they -- they actually raised several claims attacking the notice provisions, saying that they didn't adequately receive notice, and -- and the constitutionality of the action taken by the Village. It was all

taken pursuant to the order of Judge Deegan of which there was adequate notice by Judge Deegan's own determination. He found that the notice was adequate. And it was pursuant to that order that we entered onto this property and demolished it. Judge Deegan's order also allowed the Village of Capac to file -- gave us a lien. So all of those items are by virtue of court order.

Mr. Penzien claims that he didn't have notice, and in particular that notice wasn't served upon him. But the Village isn't obligated to serve him with notice under the statute. We're obligated to serve the taxpayer of record, and Mr. Penzien, if the Court would look to the Land Contract, required that Holmes Enterprises be the taxpayer of record.

* * *

I know that Plaintiff wants to argue that they should have gotten actual notice or there was an ability for them to get actual notice, but their contract provided that the Land Contract vendee was to be the taxpayer. State Law requires us to list the Land Contract vendee. They -- they apply for the tax records. And, actually, that's all taken care of by the county, not by the Village. So we did comply with that, your Honor.

* * *

APPENDIX M

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

HOLMES ENTERPRISES, INC.,

Petitioner,

vs.

VILLAGE OF CAPAC,

Respondent.

Case No. D-02-0934-CZ
Hon. Peter E. Deegan

JUDGMENT IN FAVOR OF RESPONDENT

MICHAEL W. ROGENSUES P34639
Attorney for Petitioner
32509 Utica Road
Fraser, Michigan 48026
(586) 294-5600

BEAUCHAMP, KELLY, WHIPPLE, ZICK,
KEYES & HULEWICZ, P.L.L.C.
KEITH D. ZICK P24154
Attorney for Respondent
627 Fort Street
Port Huron, Michigan 48060
(810) 987-4111

At a session of court
held September 19, 2002

PRESENT: Hon. Peter E. Deegan, Circuit Judge

This cause having come on to be heard upon a trial of the Complaint filed herein, the Court having considered the pleadings in this matter including the record of the Village Council, the briefs filed by the parties, the motion of the respondent and no proofs having been offered by petitioner;

IT IS HEREBY ORDERED AND ADJUDGED:

Judgment is hereby entered in favor of Respondent, VILLAGE OF CAPAC, and the decision of the Village of Capac Council to demolish the unsafe and dangerous building at 103-105 South Main Street, Capac, Michigan, is affirmed.

There was proper and sufficient notice provided to Holmes Enterprises, Inc., of a hearing and competent, material and substantial evidence on the record and in the files of the Village of Capac for the determination that the building located at and commonly referred to as 101 and 103 south Main Street, Capac, Michigan, is a dangerous building as defined by the Capac Ordinances. Said premises being more specifically described as those premises situated in the Village of Capac, St. Clair County, Michigan, to-wit:

Lot 1, except the West 36 feet thereof also the North 10 feet of the East 114 feet of Lot 1, B1S, R1W, Part of the Village of Capac.

The Respondent, VILLAGE OF CAPAC, having utilized a competitive bidding process shall forthwith demolish said

building with the cost of demolition to be a lien against the real property on which the building is located and assessed against the real property on the next tax roll.

Attorney fees, administrative costs and other expenses in the amount of Five Thousand ($5,000.00) Dollars is awarded to the Village of Council and shall be paid by Holmes Enterprises, Inc., to the Village of Capac within sixty (60) days.

In the event Holmes Enterprises, Inc., does not pay the sum of Five Thousand ($5,000.00) within sixty (60) days the amount of the award shall be increased to the sum of Seven Thousand Seven Hundred Ten ($7,710.00) Dollars and shall be a lien against the real property on which the building is located and assessed against the real property on the next tax roll.

The amount of the line for demolition of the building and the $7,710 lien for attorney fees, administrative costs and other expenses shall be established by execution and recording with the Register of Deeds Office an affidavit executed by the Village of Capac Clerk attesting to the cost of demolition and the fees, costs and expenses provided for in this Judgment.

The Court shall retain jurisdiction for purposes of enforcement.

PETER E. DEEGAN
CIRCUIT JUDGE

Approved as to Form:

/s/Michael W. Rogensues/per authority/KZ
MICHAEL W. ROGENSUES
Attorney for Petitioner

APPENDIX N

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

HOLMES ENTERPRISES, INC,

Plaintiff,

vs.

VILLAGE OF CAPAC,

Defendant.

and

BERNARD PENZIEN and KAREN PENZIEN,

Intervening Plaintiffs

Case No. D-02-0934-CZ
HON. PETER E. DEEGAN

EMERGENCY MOTION TO INTERVENE

KEITH D. ZICK (P-24154)
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DAVID R. HEYBOER (P-27975)
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Heyboer & Floyd, P.L.L.C.
1530 Pine Grove Avenue, Suite 5
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(810) 982-5400

NOW COMES Intervening Plaintiffs, Bernard Penzien and Karen Penzien, by and through his attorneys, Heyboer & Floyd, P.L.L.C., and for his Emergency Motion to Intervene says:

1. That Intervening Plaintiff is the fee title holder to property commonly known as 101-105 South Main Street, Capac, Michigan.

2. That Intervening Plaintiff has previously sold the above real property on land contract, which was thereafter assigned to Plaintiff Holmes Enterprises, Inc.

3. That prior to the present, a fire did occur at the subject structure.

4. That upon information and belief, Holmes Enterprises was seeking various repairs and remodeling to the subject property.

5. That following the fire loss Plaintiff did continue to make certain and various land contract payments.

6. That upon information and belief, the Village Council of Capac did vote to demolish the building.

7. That at no time prior to or after have Defendant's provided notice to Intervening Plaintiff of the order to demolish the structure.

8. That upon information and belief, Plaintiff filed the above action against Defendant which resulted in an order affirming the Defendant's decision to demolish Intervening Plaintiff's building.

9. That at no time was Intervening Plaintiff a party to the action; nor was Intervening Plaintiff aware of the underlying proceeding.

10. That on October 23, 2002, at approximately 3:30 p.m., Intervening plaintiff received a telephone call that the building was being demolished.

11. That counsel for Intervening Plaintiff immediately contacted the attorney for Defendant and demanded that the demolition immediately cease.

12. That upon information and belief, despite the telephone call from counsel, as well as a follow-up letter, the demolition continued until the close of business on October 23, 2002.

13. That upon information and belief, the building, while damages by Defendant, can be salvaged and repaired so that it will remain a valuable assets to Intervening Plaintiff.

14. That Defendant is proceeding with the demolition of the building under this Court's authority, and as such, the issues herein raised should properly be addressed by this Court.

15. WHEREFORE, for the foregoing reasons, your Intervenors requests this Court grant his Motion and allow them to proceed in the above matter.

HEYBOER & FLOYD, P.L.L.C.
Attorneys for Defendant

/s/David R. Heyboer
DAVID R. HEYBOER (P-27975)
1530 Pine Grove Avenue, Suite 5
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(2)

No. 06-1570

FILED

JUN 28 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

BERNARD PENZIEN and KAREN PENZIEN,
Petitioners,

v.

VILLAGE OF CAPAC,
a Michigan municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

JULIE MCCANN O'CONNOR
Counsel of Record
JAMES E. TAMM
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(248) 433-2000

Counsel for Respondent

June 28, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Did the Michigan Court of Appeals correctly hold that due process was satisfied, where the Respondent provided notice which was reasonably calculated to give actual notice of the pendency of the proceedings to those with an interest in the property prior to any state action?

2. Did notice given to the taxpayer of record, in compliance with state statute and village ordinance, provide a constitutionally reasonable method of informing interested parties of the pendency of the proceedings prior to any state action?

3. Did the state statute/village ordinance, which provided for placement of a demolition lien on property after the Respondent complied with the requirements of the statute by giving notice reasonably calculated to apprise interested parties of the pendency of the proceedings, and after Respondent conducted a hearing and after judicial review, satisfy the due process requirements of the Fourteenth Amendment?

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CONTRARY TO PETITIONERS' ASSERTIONS, THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, RATHER, IT FAITHFULLY FOLLOWS PRECEDENT IN AN AREA OF CONSTITUTIONAL LAW WHICH IS NOW WELL-SETTLED. 5

A. The Due Process Requirements of the Constitution were Satisfied when Respondent Provided Written Notice which was Reasonably Calculated to Apprise Those with an Interest in the Property of the Pendency of the Proceedings 7

B. Respondent Complied with the Due Process Clause of the Fourteenth Amendment by Giving Notice which was "Reasonably Calculated" to Inform Petitioners of the Proceedings and an Opportunity to be Heard, Before Placing a Dangerous Building Assessment Lien on the Property. 14

C. M.C.L. 125.540 and Respondent's Ordinance are Constitutionally Sufficient as Applied to Petitioners, and Provided All the Procedural Protection which the Circumstances Required. 20

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Capac Village Code, Article III, Sec. 6-73 3

Respondent, Village of Capac, a Michigan municipal corporation, respectfully requests that this Court deny Petitioners, Bernard Penzien and Karen Penzien's, Petition for Writ of Certiorari (May 29, 2007) ("Petition"), seeking review of the opinion of the Michigan Court of Appeals dated June 29, 2006 and the Michigan Supreme Court's denial of Petitioners' Application for Leave to Appeal dated February 27, 2007. (Pet. App. A and B).

STATEMENT OF THE CASE

A. Facts

This litigation arises from Petitioners' claim that the Respondent, Village of Capac, violated their constitutional right to due process when it demolished a fire damaged building located on property which Petitioners had sold on land contract. The fire occurred in November 1999, and the building remained in damaged condition for over two years.

Petitioners sold the property on land contract in 1997, and in November 1998, the original land contract purchasers assigned their interest to Holmes Enterprises, Inc., a Michigan corporation. The land contract provided that the purchaser would be responsible for paying all taxes and assessments, and it was therefore Holmes' name which appeared on the tax rolls, rather than that of the Petitioners. Prior to 1999, Petitioners' names appeared as taxpayer of record on the Respondent's real property tax roll. (Pet. App. K, p. 49a).

In February 2002, more than two years after fire damaged the building on the property, Respondent ordered a structural inspection from an engineering company which revealed serious structural defects in the building, including one wall

which was "unstable and subject to collapse." (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. F, engineering report). Following receipt of the report, the Village conducted a dangerous building hearing on March 18, 2002. Pursuant to state statute and its local ordinance, notice was provided to "each owner or party in interest in the building or structure in whose name the property appears on the last local tax assessment records." (Pet. App. F, p. 34a, M.C.L. 125.540(2); Pet. App. E, p. 31a; Capac Vilage Code Art. III, Sec. 6-68. Notice). The only name which appeared on the last local tax assessment records was that of Holmes Enterprises, which received the notice and appeared at the hearing. At the hearing, the Council determined that notice had been served on the person whose name appeared in the most recent Village tax assessment records, and was also posted on the building. All "interested parties" had been allowed to address the Village Council, and the report of the Village Inspector had been given full consideration. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. G, Determination of Capac Village Council After Dangerous Building Hearing Regarding 101 and 103 South Main Street, Capac). The owner, Holmes, was given twenty (20) days to repair, demolish, or make safe the building. If action was not taken within that time, the Village would demolish the building, with the cost to be a lien against the real property on which the building was located and assessed on the next tax roll. (Id.). Petitioners were aware that the Respondent had conducted a public hearing and declared the building to be dangerous, but took no action to assert their interests. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. I).

Holmes challenged Respondent's determination in state Circuit Court, as provided for by Village ordinance. Article III, Sec. 6-73. (Pet. App. E, p. 32a). The circuit court entered judgment in favor of the Respondent Village on September 19, 2002. (Pet. App. M, p. 54a). It directed the Respondent to demolish the building with the cost to be a lien against the real property on which the building was located, and assessed against the real property on the next tax roll. The demolition began on October 23, 2002, at which time Petitioners attempted to intervene, but never filed their emergency motion. (Pet. App. N, 57a). Following demolition, the lien against the real property was recorded with the St. Clair County Register of Deeds in the amount of $51,239.00. (Pet. App. H).

B. Trial Court Proceedings

1. District Court

Following the demolition of the building, Holmes apparently failed to make certain payments due under the land contract, and in 2003, Petitioners filed a forfeiture action in state district court to regain the property. A Judgment of Possession After Land Contract Forfeiture was entered on March 26, 2003. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. M).

In the forfeiture action, Petitioners named not only Holmes, the assignee of the land contract vendee, but also Respondent, Village of Capac. On June 26, 2003, an "Order of Eviction Landlord-Tenants/Land Contract" was filed with the district court. The Writ of Restitution signed by the state judge directed the court officer to remove the named Defendants and other occupants from the premises and to

restore personal possession to the Plaintiffs. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. N).

2. Circuit Court Litigation

Petitioners filed suit in state circuit court in March 2004, alleging that the Respondent's demolition of the property was unconstitutional and seeking damages. Petitioner alleged a violation of procedural due process, inverse condemnation, violation of substantive due process, and trespass. (Count II - Count V). Count I was an action to quiet title, claiming that the equitable interest of Holmes was terminated and, thus, Respondent's lien on the real property was also extinguished. Respondent moved for summary disposition in its first responsive pleading. M.C.R. 2.116 (C)(10). The trial court granted Respondent's motion in part, dismissing Counts II-V, and specifically found that Petitioners' due process rights were not violated, and that notice was provided and was actually received by the land contract vendee, Holmes. Subsequently, the trial court granted Petitioners' motion for summary disposition of Count I, Action to Quiet Title, to remove the demolition lien from the property.

C. Michigan Court of Appeals

Both parties appealed the decision of the circuit court to the Michigan Court of Appeals. The Court of Appeals affirmed the lower court's decision dismissing Counts II-V, including Petitioners' claim of procedural due process. The court concluded:

> M.C.L. 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant [Capac] did not have

> any indication that the notice it sent did not notify the proper parties. The fact that plaintiffs [the Penziens] had an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of M.C.L. 125.540 are constitutionally insufficient." (Pet. App. B, 9a-10a).

The Court of Appeals reversed the trial court's decision removing the demolition lien from the property. It concluded that Petitioners' argument that the lien only attached to Holmes' equitable interest and not to the land was erroneous. (Pet. App. B, 12a). The land contract forfeiture proceedings could not remove the demolition lien which attached to the property itself. (Id.). The Court of Appeals rejected their argument that M.C.L. 125.540 was an unconstitutional due process violation. (Id., p. 13a).

D. Michigan Supreme Court

Petitioners filed an Application for Leave to Appeal to the Michigan Supreme Court, which was denied on June 29, 2006. (Pet. App. A). Petitioners now ask this Court to review the decision of the Michigan Court of Appeals.

REASONS FOR DENYING THE PETITION

CONTRARY TO PETITIONERS' ASSERTIONS, THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, RATHER, IT FAITHFULLY FOLLOWS PRECEDENT IN AN AREA OF CONSTITUTIONAL LAW WHICH IS NOW WELL-SETTLED.

In an understandable attempt to transform their Petition into one worthy of review, Petitioners claim that the lower

court's opinion conflicts with this Court's precedent. Further, the Petitioners misstate the basis of Respondent's argument.

Admittedly, before a state may deprive any person of property, the Due Process Clause of the Fourteenth Amendment requires government to provide "notice and opportunity to be heard." ***Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950)**. Due process does not, however, require actual notice of the proceedings. ***Dusenbery v. United States*, 534 U.S. 161, 170 (2002)**. Instead, opinions of this Court have allowed government to defend the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected." ***Mullane*, 339 U.S. at 315**. M.C.L. 125.540 provided a means of giving notice that was reasonably calculated to give notice to interested parties. The Village attempted to provide actual notice to interested parties -- the state statute and Village ordinance required notice by mail "to the owner or party in interest in whose name the property appears on the last local tax assessment records." M.C.L. 125.540(2). That notice was "reasonably calculated" to provide notice to property owners - owners are generally responsible for payment of such taxes. And indeed, the notice was received by an owner of the property, Holmes, which appeared and contested the decision of the Respondent that the building was dangerous and must be repaired or demolished.

Because Petitioners required Holmes to pay the property taxes, Petitioners were not listed as owners on the local tax assessment records, and therefore did not receive actual notice. Moreover, although Holmes did receive notice, it did not inform Petitioners of the pendency of the proceedings. Prior to 1999, the tax rolls of the St. Clair County Treasurer designated the Penziens as taxpayers, as they acknowledge. (Pet. App. K, ¶ 6, p. 49a). The tax rolls were changed only

because Holmes was allowed to record the land contract assignment. (Pet. App. G, p. 18a). Petitioners' argument rests on the faulty premise that because they themselves did not receive actual notice (although Holmes did), there was no attempt to provide actual notice to them and due process was therefore violated. The Village did attempt to provide actual notice by mailing notice to the taxpayer of record, and that was all that was required. (See ***Dusenbery,* 534 U.S. at 170**, noting that ***Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983)** did not say "that the state *must provide* actual notice, but that it must *attempt to provide* actual notice." (Emphasis in original)). M.C.L. 125.540 provides for a means of giving notice which is "reasonably calculated" to give notice to the interested parties and therefore satisfied the Due Process requirements of the Fourteenth Amendment.

A. The Due Process Requirements of the Constitution were Satisfied when Respondent Provided Written Notice which was Reasonably Calculated to Apprise Those with an Interest in the Property of the Pendency of the Proceedings

Respondent agrees that Petitioners had a legally protected interest in the property which was afforded protection under the Due Process Clause of the Fourteenth Amendment. Both a titleholder and a land contract purchaser have a due process interest in the property that is subject to the land contract. ***Brandon Twp. v. Tomkow,* 211 Mich. App. 275, 282; 535 N.W.2d 269 (1995)**. The Village provided the Petitioners with all the process to which they were due by mailing notice of the pendency of the proceedings and demolition to the taxpayer of record as listed on the most recent Village tax assessment rolls. That was notice which was "reasonably calculated," under all the circumstances, to apprise interested parties of the action. ***Mullane, supra*, 339 U.S. at 314**. The

Michigan Court of Appeals stated that there was no dispute that the Village complied with the state statute requiring mailed notice to each owner and party in interest appearing on the tax rolls and by posting notice on the building. (Pet. App. B, p. 8a). Contrary to Petitioners' assertion, the Village attempted to provide actual notice to all owners by (1) mailing notice, and by (2) posting notice. That Petitioners did not receive actual notice was due to actions taken by them, not by any failure of the Village to provide notice "reasonably calculated" to inform them of the proceedings.

This is not a situation as Petitioners would have it, where Respondent attempted to provide notice simply by publication or posting[1]. Cases which found publication or posting alone to be inadequate to meet the requirements of due process are simply inapposite to the circumstances herein. Numerous cases have recognized the constitutional sufficiency of using the United States Postal Service to send notice to property owners as adequate, even when notice by publication was insufficient. ***Dusenbery*, 534 U.S. at 170, n. 4.**[2] Notice is not constitutionally insufficient simply because an interested party did not actually receive that notice prior to state action. ***Id.***

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[1] Although posting has been deemed by this Court to be not only constitutionally acceptable, but "a singularly appropriate and effective way of insuring that a person is actually apprised of proceedings against him." ***Greene v. Lindsey*, 456 U.S. 444, 452 (1982); *Jones v. Flowers*, 547 U.S. 220; 126 S. Ct. 1708, 1719 (2006).**

[2] For this proposition, ***Dusenbery*** cited ***Mullane*, 339 U.S. at 319; *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956); *Schroeder v. City of New York*, 371 U.S. 208, 214 (1962); *Mennonite*, 462 U.S. at 798;** and ***Tulsa Professional Collection Serv. v. Pope*, 485 U.S. 478, 490 (1988).**

Actually, the gist of Petitioners' argument is that the method of notice used by Respondent was not "reasonably calculated" to apprise those with an interest in the property of the pendency of the proceedings because it did not inform Petitioners. This is a difficult argument to make, as it is undisputed that one of the owners with an interest in the property, Holmes, actually received the notice and participated in the proceedings. In determining whether notice meets the "reasonably calculated" standard, ***Mullane*** supplies the appropriate analytical framework.

In ***Mullane***, this Court considered the issue of what constituted sufficient notice to the beneficiaries of a common trust fund under New York law that was facing judicial settlement. State law required only publication notice to the beneficiaries, in spite of the fact that the beneficiaries' rights to the fund would be terminated by the decree. **339 U.S. at 311**. The Court engaged in a balancing analysis between the state's interest in reaching a final settlement and the individual's interests in their property. The Court held that "notice, reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" was required. ***Id.*** **at 314**. Publication notice was sufficient for beneficiaries whose interests or addresses were unknown (***Id.*** **at 317**), however, "[w]here the names and post office addresses of those affected are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." **339 U.S. at 318**. The trustee had the names and addresses of the income beneficiaries already, and periodically remitted income to them. There was no reason to dispense with informing them of the proceedings. The Court expressly rejected the view that a search "under ordinary standards of diligence" was required, however. **339 U.S. at 317**.

In cases where this Court has concluded that notice was inadequate, it was not "reasonably calculated" to reach interested parties. See ***Walker,* 352 U.S. at 112,** (publication as sole notice to property owners inadequate to inform them of condemnation proceedings); ***Schroeder,* 371 U.S. at 208** (publication in two newspapers miles from owner's property, plus signs posted on trees in general vicinity inadequate to notify property owners of condemnation proceedings); ***Greene,* 456 U.S. at 444** (posting summons on door of tenant's apartment, under circumstances where notices were frequently removed, inadequate to notify tenants of eviction proceedings); ***Tulsa Professional,* 485 U.S. at 478,** (publication inadequate to inform creditors of institution of probate proceedings where known or "reasonably ascertainable;" for other creditors, publication can suffice).

The key focus is on the "reasonableness" of the means chosen by the state. ***Mullane,* 339 U.S. at 315**. The "reasonably calculated" standard is the benchmark for notice. It is left to the state to determine the form of service to adopt, balancing the "interests of the state with the individual interest sought to be protected by the Fourteenth Amendment." ***Id.* at 315**. In this instance, the state statute and Village ordinance mandated notice by mail, in addition to posting on the property. Notice was sent to the taxpayer of record. The state court reasonably concluded that this method of notice was calculated to alert interested parties to the proceedings. Petitioners repeatedly assert that they were not provided with actual notice of the proceedings, as if that fact alone was sufficient to conclude that notice was constitutionally inadequate. That is not the standard against which the Respondent's actions are measured. The form of service used by Respondent, in the great majority of cases, does inform interested parties of the pendency of proceedings, just as it did in this case. As recognized by *Mullane*, "[n]ow and then an

extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done." ***Id.*** **at 319, quoting** ***Blinn v. Nelson*****, 222 U.S. 1, 7 (1911).**

Petitioners rely heavily on ***Mennonite, supra***, to support their claim that actual receipt of notice was required to satisfy constitutional standards, rather than notice "reasonably calculated" to inform interested parties of the proceedings.

In ***Mennonite***, an Indiana statute required notice of sale of real property for nonpayment of taxes to be posted in the county courthouse, and notice by certified mail to be sent to property owners, but not to mortgagees. The property on which Mennonite held a mortgage was sold to the appellee, and Mennonite did not know of the sale until after the redemption period had run. This Court held that the mortgagee was entitled to notice of the pending tax sale and that publication and notice to the owner were insufficient. In ***Mennonite***, the tax sale would have nullified the mortgagee's interest "immediately and drastically." **462 U.S. at 798**. It is uncontroverted, however, that Petitioners', as titleholders, retain a significant interest in the land, even after its subordination to the demolition lien. Therefore, attachment of the lien did not immediately and drastically diminish Petitioners' interests in the same manner as the due process deprivation in ***Mennonite***.

More recently, in ***Dusenbery, supra,*** this Court reaffirmed its commitment to the "reasonably calculated" standard of ***Mullane***, noting, since ***Mullane*** was decided "we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice." **534 U.S. 161, 168**. In response to petitioner's argument that

the government failed to provide him with actual notice, in spite of the fact that he was in federal custody when notice was sent, ***Dusenbery*** clarified that actual notice has never been a requirement under ***Mullane.*** It distinguished ***Mennonite***, noting that ***Mennonite*** did not say that the state "*must provide*" actual notice, only that it must "*attempt to provide*" actual notice. ***Id.*** **at 170**.

Relying on ***Jones v. Flowers, supra***, the Michigan Court of Appeals rejected Plaintiffs' claim that despite the fact that Holmes was listed on the tax roll, the Village could easily have discovered Petitioners' names, and was required to do so.

> Plaintiffs' assert that despite the fact Holmes appeared on the tax rolls, and notice of demolition was sent to Holmes and allegedly posted on the building, the village could have easily discovered plaintiffs were the actual title holders and accordingly sent them notice.
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> * * *
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> We conclude that defendant's compliance with the statute adequately protected plaintiffs' due process rights.
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> * * *
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> *Jones* stands for the proposition that a governmental entity does not have the obligation to search government records for a new address, and by inference is not required to perform a title search. M.C.L. 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant did not have any

> indication that the notice it sent did not notify the proper parties. The fact that plaintiffs had an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of M.C.L. 125.540 are constitutionally insufficient. ***Penzien v. Village of Capac,*** **unpublished opinion per curiam of the Court of Appeals, Nos. 259536, 259540, dated June 29, 2006.** (Pet. App. B, 6a, 8a 9a).

Here, Respondent made "reasonably diligent efforts" to inform interested parties. The Due Process Clause does not require "heroic efforts," it only requires that the government effort be "reasonably calculated" to inform interested parties. ***Dusenbery,*** **534 U.S. at 170**. Once Respondent made a constitutionally sufficient effort to attempt to provide actual notice to interested parties – by mailing notice to the owner or party in interest in whose name the property appeared on the last local tax assessment records, and by posting notice on the building – there can be no constitutional claim. The means chosen by the state statute and Village ordinance balanced the interest of the state with the individual interest to be protected by the Due Process Clause. ***Mullane,*** **339 U.S. at 314**. It is up to the state to determine what form of service to adopt, and states have taken a variety of approaches. ***Jones v. Flowers,*** **547 U.S. 220 (2006)**.

In most circumstances, mailed notice to owners or parties in interest listed on the tax records will be actual notice to those parties, as it was in this case, where Holmes received the notice and appeared to oppose the Respondent's determination to demolish the building. The totality of the circumstances is what determines the sufficiency of notice. The method chosen by state statute and Village ordinance generally provide interested parties the ability to protect their

interests. The Respondent had a vital interest in safeguarding the health and welfare of its citizens by having a fire damaged building either repaired or demolished. After demolition, it had an equally important interest in collecting the funds which it expended to accomplish the demolition. Assessment of taxes occurs on a regular basis, and use of the tax assessor's records was therefore "reasonably calculated" to provide Respondent with the name and address of those with an interest in the property. Petitioners had the ability to safeguard their interests with minimum effort, by listing themselves on the tax rolls so that any notices would come to their attention. Indeed, they were listed until 1999, when they allowed Holmes to record its interest, which added its name and address, and removed their's. This was not a situation where there was no practical way for Petitioners to learn of government action which affected their property interests. The Due Process Clause does not require the government to save petitioners from their own lack of care where they fail to protect their interest, despite the ability to do so.

B. Respondent Complied with the Due Process Clause of the Fourteenth Amendment by Giving Notice which was "Reasonably Calculated" to Inform Petitioners of the Proceedings and an Opportunity to be Heard, Before Placing a Dangerous Building Assessment Lien on the Property.

Petitioners raise the same argument as that advanced in Section A, *supra*, that failure to provide Petitioners with actual receipt of notice of demolition proceedings before placement of the demolition lien on the property violated due process. This Court has never required actual notice, only notice "reasonably calculated" to apprise interested parties of the pendency of the proceedings. ***Dusenbery, supra* at 170**. Notice provided in accord with state statute and Village

ordinance was constitutionally sufficient because notice to the taxpayer of record was "reasonably calculated" to provide actual notice to Petitioners, and Respondent "heard nothing back indicating that anything had gone awry." ***Jones, supra*, 547 U.S. 220; 126 S. Ct. at 1714**. Petitioners' claim that Respondent "changed the tax records to reflect the interest of Holmes, [and therefore] Petitioners were not provided notice of any proceedings" (Petitioners' Brief, p. 21) is not factually accurate. Obviously, Respondent did not unilaterally effect this change; it was done because Petitioners acquiesced in the substitution of Holmes as taxpayer of record in place of Petitioners, based on Petitioners' requirement that the land contract vendee pay the property taxes. Notice was sent to the owner, Holmes, but because of this change to the tax records (and because Holmes did not inform Petitioners), Petitioners were no longer listed as taxpayers of record and did not receive actual notice.

Nonetheless, Petitioners were aware of the proceedings. They were aware that the Respondent had declared the building to be dangerous during a public hearing, but took no action. (Appellee's Response to Appellants' Application for Leave to Appeal in Michigan Supreme Court, Apx. I). Finally, they attempted to intervene at the time demolition began, thus they had actual notice prior to demolition and prior to attachment of the demolition lien. M.C.L. 125.541(6) provides for attachment thirty (30) days after notice to interested parties if those parties fail to pay the cost. (Pet. App. F, p. 34a). Petitioners could have taken action, but failed to do so apparently due to their assumption that only the interest of Holmes, the land contract vendee, was affected by the lien.

Cases cited by Petitioners to support their argument that they received no notice and that therefore the statute is

unconstitutional, are dissimilar to the circumstances here. In cases cited by Petitioners, a statute authorized pre-judgment attachment of property without prior notice or a prior hearing. In contrast, M.C.L. 125.540 and the Village ordinance provide for both prior notice and hearing.

In ***Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988)**, there was no attempt to provide either actual or constructive notice. **485 U.S. at 81-84**. A default judgment was entered against Peralta in a suit by Heights Medical Center to recover a sum due for a hospital debt which he had guaranteed for one of his employees. Peralta learned of the judgment only after his property had been sold at a great discount. He attempted to set aside a default judgment because he was never served and had no notice of the suit. This Court noted that due process required notice "reasonably calculated" to apprise him of the pendency of the action against him, citing ***Mullane, supra***.

In ***Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969)**, this Court held that a Wisconsin statute permitting pre-judgment garnishment of a debtor's wages without prior notice or hearing violated the Due Process Clause of the Fourteenth Amendment. The Court noted that the statute allowed a court clerk rather than a judge to garnish a defendant's wages at the request of the creditor's attorney. ***Id.* at 338**.

***Fuentes v. Shevin*, 407 U.S. 67 (1972)** invalidated Florida and Pennsylvania replevin statutes on due process grounds. The Florida statute allowed a creditor to seize personal property of a debtor without a showing of probable cause, without judicial supervision, and without prior notice or hearing. ***Id.* at 73-74**. The Pennsylvania statute not only lacked the same procedural safeguards as the Florida statute,

but also failed to provide for a post-deprivation hearing. ***Id.* at 75.** Although the creditor was required to post a security bond, the Court found procedural safeguards to be inadequate.

In ***Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)**, the Court declined to strike down a Louisiana statute that permitted a creditor/lienholder to seek the sequestration of disputed goods in an *ex parte* proceeding. The statute required the creditor to present an affidavit to a judge and post a security bond and required the judge to hold a post-deprivation hearing immediately. It allowed the debtor to regain interim possession of the property by filing a substitute bond.

In ***North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)**, Georgia's pre-judgment garnishment statute was struck down. It allowed a creditor to obtain an *ex parte* writ garnishing a debtor's bank account after submitting an affidavit containing only conclusory allegations to a court clerk. The Court held that the statute violated the Due Process Clause because it lacked any requirement for an affidavit of probable cause or judicial oversight and included no provision for a hearing.

In ***Connecticut v. Doehr*, 501 U.S. 1 (1991)**, Connecticut's *ex parte* pre-judgment attachment statute was found unconstitutional because it did not provide for a pre-disposition hearing, and thus, violated due process. The plaintiff applied to state court for an attachment on Doehr's home in connection with a civil suit for assault and battery which he was instituting against Doehr in the same court. The application was supported by a "skeletal" affidavit. Doehr received notice only after the sheriff attached his property.

In ***Doehr***, this Court applied the factors cited in ***Mathews v. Eldridge,* 424 U.S. 319 (1976)**, and concluded that without pre-attachment notice and hearing, the risk of erroneous deprivation was too great to satisfy due process and the interests in favor of *ex parte* attachment were too minimal to justify burdening Doehr's ownership rights without a hearing to determine the likelihood of recovery, where the effect on Doehr's property was significant.[3]

Admittedly, imposition of a demolition lien would impair Petitioners' ability to sell and would cloud title to the property. However, the risk of erroneous deprivation was far lower here than in ***Doehr***, where attachment of Doehr's house was as security for a possible judgment on an assault and battery claim. ***Doehr*** noted that "[u]nlike determining the existence of a debt or delinquent payments, the issue does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.'" ***Doehr,* 501 U.S. at 14, quoting *Mitchell,* 416 U.S. at 609**. Here, determining the cost of the demolition lien was both uncomplicated and easy to document.

The third prong of the ***Doehr*** test examined the interests of the plaintiff. In ***Doehr***, the only interest in attachment was to insure availability of assets if plaintiff prevailed on the merits of his tort action. **501 U.S. at 14**. Unlike the plaintiff

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[3] ***Dusenbery, supra***, held that the ***Mullane*** test of reasonableness under the circumstances, rather than ***Mathews v. Eldridge*** supplied the appropriate analytical framework for the due process analysis. ***Dusenbery*, 534 U.S. at 161, 168**. ("... [W]e have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since ***Mullane*** was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice.")

in ***Doehr***, this was not a tort action, but was to determine the existence and amount of a lien which lends itself to accurate assessment (and of course, the circumstances also differ from ***Doehr***, because Respondent provided written notice to parties in interest, who actually appeared). Respondent had a strong interest in insuring that the danger to the public was removed and that the cost to do so was not a charge on the taxpayers. The procedure in M.C.L. 125.540 differed markedly from that of the cases cited by Petitioners. The Michigan Court of Appeals rejected Petitioners' claim that M.C.L. 125.540 was unconstitutional on its face:

> To the extent that plaintiffs' raise a facial challenge to the constitutionality of M.C.L. 125.540, we conclude that in most instances notice provided pursuant to the statute will provide actual notice to the property owner, and therefore, plaintiffs' facial challenge fails. (Pet. App. B, p. 10a).

The facts here to do not fall into the category of cases which ***Doehr*** sought to distinguish. Respondent expended a significant sum to demolish the dangerous building. The necessity for the demolition was established at the March 18, 2002 hearing. Respondent attempted to provide actual written notice to those with an interest in the property. One who had such an interest, Holmes, received the notice, appeared at the hearing, and later contested that determination in state court. The state court issued a judgment in Respondent's favor, allowing the demolition. Prior notice and hearing were provided for by M.C.L. 125.540 and Village ordinance, unlike the cases cited by Petitioner. The risk of erroneous deprivation was likewise low because the facts of the underlying claim were easily documented, unlike a tort action.

Constitutionally sufficient notice was provided to Petitioners, and consequently no due process violation occurred.

C. M.C.L. 125.540 and Respondent's Ordinance are Constitutionally Sufficient as Applied to Petitioners, and Provided All the Procedural Protection which the Circumstances Required.

Once again, Petitioners claim that any statute that fails to require receipt of actual notice to them, as an owner of property, violates the Due Process Clause. (Petitioner's Brief, p. 24). Once again, Respondent asserts that due process does not require that the state "provide *actual notice*," but only that it must "*attempt to provide actual notice.*" ***Dusenbery,* 534 U.S. at 170**. (Emphasis in original). The "reasonableness" standard of ***Mullane*** governs. The government may defend the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected." ***Mullane,* 339 U.S. at 315**.

As the Michigan Court of Appeals reasoned:

> All of plaintiffs' claims for damages are based on an allegation that plaintiffs were deprived of their procedural due process rights when defendant demolished the building without notice to them. Plaintiffs claim due process requires notice be given to a land contract vendor. Plaintiffs also claim that the village ordinance and the state statute that defendant relied on to give notice are unconstitutional.

* * *

> [I]t is clear that plaintiffs have a due process interest in the land. However, due process does not require actual notice to an interested party, only that the effort in giving notice be reasonably calculated to apprise interested parties of the action. *Dusenbery, supra* at 170-171. (Pet. App. B, 6a, 7a).

The Court of Appeals concluded that the statute provided for a means of giving notice which was reasonably calculated to give notice to interested parties.

Indeed, one of the owners of the property received notice, appeared, and contested the Respondent's determination regarding the condition of the building. Petitioners acknowledge that fact. The statute and ordinance are "reasonably calculated" to convey the necessary information to Petitioners and, are thus, compliant with due process. Respondent sent notice which was received by an owner of the property. The government is not constitutionally obligated to seek alternative means of notice when a generally reasonable notice procedure fails in a particular situation, unless there is something to alert it that the notice was not received. Only then is it required to take additional steps, "if practicable to do so." ***Jones*, 547 U.S. 220; 126 S. Ct. at 1718**. Among the reasonable options cited by ***Jones*** was posting on the property (which the statute required and which Respondent did). But there is no obligation to search government records for a new address. ***Id.* at 1719**. Under these circumstances, there was no unconstitutionality.

Even utilizing the balancing test of ***Mathews v. Eldridge, supra***, which analyzed the requirements of due process in administrative proceedings, respondents complied with constitutional requirements. ***Mathews*** determined that an evidentiary hearing prior to termination of Social Security

Disability benefits was not required. It considered the private interest affected, the risk of erroneous deprivation, and the government's interest, including administrative burdens that additional procedural requirements would entail. **424 U.S. at 334-335**.

Although the interest affected by the termination of disability benefits might be significant, this concern was offset by the existence of other possible sources of income which would become available following termination of benefits. The reliability of the pre-termination procedures was an additional procedural safeguard. This Court acknowledged that an erroneous administrative decision could occur, "[b]ut the procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." ***Id.* at 344**.

A review of these factors provides support for the Michigan Court of Appeals' decision. The interest affected by the demolition lien is significant, but Petitioners retain a significant interest in the property as titleholders. Moreover, the demolition conveyed a benefit to Petitioners by removing a dangerous and fire damaged building from the property which was a potential liability to them. The procedure used to determine the necessity for and cost of demolition was accurate and reliable. The state court reviewed the procedures utilized and approved the cost of demolition. Finally, the administrative burden on Respondent to conduct additional searches for other interested parties when the method of notice used was reasonable and Respondent had no indication that notice was not received, was not required by due process.

***Wisconsin v. Constantineau*, 400 U.S. 433 (1971)** cited by Petitioners, is factually dissimilar and does not alter this

conclusion. In ***Constantineau***, a Wisconsin statute gave the chief of police the power to post notice in all retail liquor stores that sales/gifts of liquor to defendant were forbidden for one year. No notice or hearing was provided prior to the posting. This Court realized such posting would expose an individual to embarrassment and ridicule, in effect "a badge of infamy." ***Id.* at 437**. The stigma of being banned publicly constituted a denial of due process. ***Id.* at 436-437**. The one year ban on the purchase of alcohol was invalid because no notice was given and no hearing held.

Paul v. Davis*, 424 U.S. 693 (1976)** interpreted ***Constantineau to recognize a state law entitlement to "freely purchase goods." This liberty interest was entitled to procedural due process. In contrast, here notice was given and a hearing was held prior to any action by the Village. Petitioners' constant repetition that their failure to receive actual notice renders the Respondent's actions unconstitutional and a violation of their due process rights ignores the considerable body of law which requires the government's attempt to provide notice must only be "reasonable" under the circumstances. ***Mullane, supra***. The fact that a title search might have disclosed additional information to the Respondent is irrelevant. ***Jones*** held that there was no duty to search government records, even after the state was aware that notice was not received. ***Jones*, 547 U.S. 220; 126 S. Ct. at 1719 (2006)**. One of the additional steps suggested by ***Jones*** was to post notice - a step which was taken by Respondent.

The statute and ordinance were "reasonably calculated" to convey the necessary information to Petitioners. ***Mullane*, 339 U.S. at 314**. Respondent sent notice to the taxpayer of record, who received it and who had an interest in the property along with the Petitioners. Petitioners' interests were represented at the hearing, which was actually attended

by Holmes. "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all." ***Id.* at 319**. Respondent attempted to provide actual notice to the Petitioners, and also posted notice. It was not constitutionally obligated to seek alternative means of notice when a generally reasonable notice procedure failed in a particular situation and the Respondent was unaware of that fact.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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